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No. 10024

United States
Circuit Court of Appeals
For the Ninth Circuit.

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2295

B. R. MORRIS, doing business as L. RIFKIN &
SONS,

Appellant,

vs.

THE FRANKLIN FIRE INSURANCE COM-
PANY OF PHILADELPHIA, PENNSYL-
VANIA, a corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the
United States for the Southern District
of California, Central Division.

FILED

FEB 1 1912

PAUL R. O'BRIEN

United States
Circuit Court of Appeals

For the Ninth Circuit.

B. R. MORRIS, doing business as L. RIFKIN &
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NAMES AND ADDRESSES OF ATTORNEYS

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For Appellee:

JOSEPH F. RANK, Esq.,
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Los Angeles, California.

In the District Court of the United States, Southern
District of California, Central Division

No. 1099-M Civil

B. R. MORRIS, doing business as L. RIFKIN &
SONS,

Plaintiff,

vs.

THE FRANKLIN FIRE INSURANCE COM-
PANY OF PHILADELPHIA, PENNSYL-
VANIA, JANE COLLETTI, JOHN CASTA-
LET, JANE VAN DEUSEN, P. C. GERNET,
T. GROSSMAN, SHELDEN W. HYMER,
JANE SLATE, ELENORE STAPLES
BOEHNER, ONE DOE, TWO DOE, THREE
DOE, FOUR DOE, FIVE DOE, SIX DOE,
SEVEN DOE, EIGHT DOE, NINE DOE,
TEN DOE, ELEVEN DOE, TWELVE DOE,
THIRTEEN DOE, FOURTEEN DOE, FIF-
TEEN DOE, SIXTEEN DOE, SEVENTEEN
DOE, EIGHTEEN DOE, NINETEEN DOE,
and TWENTY DOE,

Defendants.

COMPLAINT

(Insurance Policies)

Comes now the plaintiff and for cause of action
against the defendants, and each of them, complains
and alleges, as follows, to-wit:

I.

That at all times herein mentioned, the plaintiff, B. R. Morris, was and now is doing business under the fictitious firm name and style of L. Rifkin & Sons, with his principal place of business located in the City of Los Angeles, County of Los Angeles, State of California.

II.

That prior to the commencement of this action, [1*] plaintiff complied with Section 2466 of the Civil Code of the State of California, by filing a certificate with the County Clerk of Los Angeles County, State of California, together with an affidavit showing publication of such certificate, all as required by said section.

III.

That the true names of the defendants sued herein as Jane Colletti, John Castalet, Jan Van Deusen, Jane Slate, One Doe, Two Doe, Three Doe, Four Doe, Five Doe, Six Doe, Seven Doe, Eight Doe, Nine Doe, Ten Doe, Eleven Doe, Twelve Doe, Thirteen Doe, Fourteen Doe, Fifteen Doe, Sixteen Doe, Seventeen Doe, Eighteen Doe, Nineteen Doe and Twenty Doe, are unknown to plaintiff, but upon ascertaining same, plaintiff will ask leave of Court to insert said true names in lieu of the fictitious names herein sued upon.

IV.

That at all times herein mentioned the defendant, The Franklin Fire Insurance Company of Phila-

*Page numbering appearing at foot of page of original certified Transcript of Record.

delphia, Pennsylvania, was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania, duly authorized and licensed to transact fire insurance business in the State of California and maintains an office in the County of Los Angeles, State of California.

V.

That plaintiff is a citizen of the State of California, and the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, is a citizen of the State of Pennsylvania; that the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand and no/100ths (\$3,000.00) Dollars.

VI.

That on the 14th day of September, 1939, the defendant, The Franklin Fire Insurance Company of Philadelphia, [2] Pennsylvania, in consideration of the sum of Fifty and no/100ths (\$50.00) Dollars and premiums thereafter to be paid, executed and delivered to plaintiff its policy of insurance in writing known as Furriers' Customers Basic Policy in a provisional amount to the extent of Twenty Thousand and no/100ths (\$20,000.00) Dollars for merchandise located in storage rooms, vaults and safes and to the extent of Ten Thousand and no/100ths (\$10,000.00) Dollars for merchandise located outside of storage rooms, vaults and safes. Said policy bore No. FC-1423, and a copy of said policy is hereto attached and marked Exhibit "A"

and hereby made a part of this complaint. That by the terms of said policy said defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, did insure said plaintiff and all the defendants except the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, from the 14th day of September, 1939, at noon, until cancellation of said insurance as in said policy provided, against all loss or damage by fire to an amount as in the policy provided as to the personal property described in said policy. That it was the intention of plaintiff and defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, that said policy of fire insurance was to cover customers' furs and garments trimmed with fur in the possession of plaintiff.

VII.

That through the mistake of plaintiff, which mistake the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, at that time knew or suspected, said policy of insurance did not truly express the intention of the parties in that said policy of insurance covered only customers' furs and garments trimmed with fur that were accepted from customers by the assured for storage, alteration, repairing, cleaning or remodeling, and for which the assured issued a receipt under which the assured agreed to effect insurance on such property; that it was the [3] intention of plaintiff, which intention the defendant, The Frank-

lin Fire Insurance Company of Philadelphia, Pennsylvania, at that time knew or suspected, not to limit said insurance policy to such furs and garments for which the assured issued a receipt and under which the assured agreed to effect insurance on the property and not to limit the liability of said company under said policy to the amount stipulated in the assured's receipt as applying to each respective article, whether on account of the assured's legal liability or otherwise.

VIII.

That said policy should be revised so as to express the intentions of the parties by excluding from the policy the following provisions, to-wit:

“This policy only covers Furs, or garments trimmed with Fur, being the property of customers, accepted by the Assured for storage, alteration, repairing, cleaning or remodeling, and for which the Assured issues a receipt under which the Assured agrees to effect insurance on the property.

“This Company shall not be liable hereunder for more than the amount stipulated in the Assured's receipt as applying to each respective article, whether on account of the Assured's legal liability or otherwise.”

and in lieu of the above provisions insert the following provisions, to-wit:

“This policy only covers Furs, or garments trimmed with Fur, being the property of customers in the possession of plaintiff.” [4]

IX.

That plaintiff was not aware of the above provisions being in said policy and said provisions were not called to the attention of plaintiff. No proper forms or receipts were furnished to plaintiff by the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, although it is customary to furnish such forms under such a policy where the above terms are intended to be enforced as a part of the policy. That plaintiff pursuant to the terms of the above policy reported to the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, not later than the fifteenth day of every month the total amount at risk under said policy on the last day of the preceding month; that the amount so reported at risk included the item herein sued on and plaintiff agreed to pay premiums thereon at the rates in the policy provided; that said defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, accepted said reports and charged a premium for insurance on the items reported including the items sued hereinunder. That by reason thereof plaintiff waived the above provisions in said policy and is estopped to rely thereon.

X.

That on or about the 30th day of November, 1939, said property was greatly damaged by fire and a large part destroyed by fire. That plaintiff is informed and believes and therefore alleges that said personal property so destroyed was of the value of Six Thousand Seven Hundred and Twenty (\$6,720.00) Dollars; that at the time of the loss said property belonged to the following defendants: Jane Colleti, John Castalet, Jane Van Deusen, P. C. Gernet, T. Grossman, Shelden Hymer, Jane Slate, Elenore Staples Boehner, One Doe, Two Doe, Three Doe, Four Doe, Five Doe, Six Doe, Seven Doe, Eight Doe, Nine Doe, Ten Doe, Eleven Doe, Twelve Doe, Thirteen Doe, Fourteen Doe, Fifteen Doe, Sixteen Doe, Seventeen Doe, Eighteen Doe, Nineteen Doe and Twenty Doe. [5] That said individuals are by reason thereof joined as parties defendant; that said insurance was issued for the benefit of said defendants; that this lawsuit is brought for and on behalf of said defendants; that at the time of said loss said property was in the possession of and held by plaintiff.

XI.

That the loss and damage sustained by said defendant owners by reason of said destruction and damage was Six Thousand Seven Hundred and Twenty (\$6,720.00) Dollars; that plaintiff immediately gave written notice of said fire and of said loss to the defendant, The Franklin Fire Insur-

ance Company of Philadelphia, Pennsylvania; that on or about the 22nd day of January, 1940, and within sixty (60) days from the date of said loss, the insured rendered to the defendants, The Franklin Fire Insurance Company of Philadelphia, at its main office in California a sworn proof of loss showing in detail the total loss and value of the personal property covered by said policy of The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, and showing the amount payable to said plaintiff under said policy of Six Thousand Seven Hundred and Twenty (\$6,720.00) Dollars; that plaintiff has performed all the conditions of said policy on his part to be performed.

XII.

That thirty (30) days after receipt of said proof of loss above set forth, to-wit, on the 22nd day of February, 1940, there became due and payable from said defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, to said plaintiff and said defendant owners the sum of Six Thousand Seven Hundred and Twenty (\$6,720.00) Dollars, together with interest thereon at the rate of seven (7%) per cent per annum from April 22, 1940, on account of and under said policy of insurance and that said defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, has refused and failed to pay said amount and has not [6] paid any part of said loss to plaintiff.

Wherefore: Plaintiff prays judgment as follows:

1. That said policy of fire insurance be amended as above provided.

2. That plaintiff and the defendant owners, entitled thereto, be given judgments against defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, in the sum of Six Thousand Seven Hundred and Twenty (\$6,720.00) Dollars, together with interest thereon at the rate of seven (7%) per cent per annum from April 22, 1940.

3. For his costs of suit and for such other and further relief as to the court seems just and proper in the premises.

ZUCKERMAN AND STEIN
By EDWARD K. ZUCKERMAN,
Attorneys for Plaintiff. [7]

EXHIBIT "A"

FURRIERS' CUSTOMERS BASIC POLICY

No. FC 1423

Stock Company

The Franklin Fire Insurance Co. of Philadelphia
Pennsylvania

In Consideration of the Stipulations Named Herein,
Does insure B. R. Morris DBA Rifkin and Sons,
hereinafter called the Assured, Whose address is
3926 Wilshire Blvd., Los Angeles, California, For
his (their) account and for account of customers
hereinafter described, From the 14th day of Sep-
tember 1939, at Noon, Standard Time at place of
issuance, until cancelled as herein provided.

Furriers' Customers Custody Rider

This policy only covers Furs, or garments trimmed with Fur, being the property of customers, accepted by the Assured for storage, alteration, repairing, cleaning or remodeling and for which the Assured issues a receipt under which the Assured agrees to effect insurance on the property, but excluding any stock belonging to the Assured or to any subsidiaries or affiliates of the Assured.

This policy covers during transportation or otherwise while the property is in the custody or control of the Assured for alteration, repairing, cleaning, remodeling, or preparation for storage or for return to customers; and while in storage rooms, vaults or safes at locations hereinafter described.

This Policy Insures:

Against all risks of loss of or damage to the insured property including the Assured's legal liability therefor, except as hereinafter provided.

This Policy Does Not Cover the Insured Property or the Assured's Legal Liability for:

(a) Loss or damage occasioned by gradual deterioration, moth, vermin, inherent vice; or damage sustained due to any process or while actually being worked upon and resulting therefrom unless caused by fire;

(b) Loss or damage occasioned by war, invasion, hostilities, rebellion, insurrection, confiscation by

order of any Government or Public Authority, or risks of contraband or illegal transportation or trade.

1. Warranted that the Assured shall use due diligence to maintain during the period of this policy such protective safeguards as are indicated in the proposal for this policy.

2. This Company shall not be liable hereunder for more than the amount stipulated in the Assured's receipt as applying to each respective article, whether on account of the Assured's legal liability or otherwise, nor in any event for more than the cost to repair or replace the article with materials of like kind and quality, provided always that this Company shall not be liable in any one casualty for more than the limit of liability as stated below for the location at which such casualty occurs:

Limits of Liability

In storage rooms, vaults and safes—\$20,000.00

Outside of storage rooms, vaults and safes—
\$10,000.00

Locations—at 3926 Wilshire Blvd., Los Angeles, California

nor for more than \$5,000.00 while at any other location not used by the Assured for storage, nor for more than \$5,000.00 while in transit.

3. It is warranted by the Assured that an accurate record will be kept of all receipts issued showing the customer's name, address and description and stipulated amount on each article included

therein, which record shall be open for inspection by duly authorized representatives of this Company at all reasonable times during the policy period and for one year thereafter.

4. The Assured agrees to report to this Company not later than the fifteenth day of every month the total amount at risk hereunder on the last day of the preceding month and to pay premium thereon at the rates herein provided. A deposit premium of \$50.00 is due and payable on the date hereof and annually thereafter, and all monthly premiums shall be charged against this deposit premium until such time as it shall have been earned by this Company, after which time the additional monthly premium shall be due and payable on the date reports are made by the Assured as herein required.

5. The premium for this insurance shall be computed at the following monthly rate(s):

.0819¢ per \$100.00 of the amount at risk

6. Any loss, at the option of this Company, may be paid to the Assured, or adjusted with and paid to the Assured's customer or the owner of the property.

7. The Assured warrants that no certifications, certificates or policies of insurance covering the property insured hereunder will be issued by or through the Assured other than in this Company, as authorized under the terms of this policy when so endorsed.

8. This policy is deemed continuous, but it may be cancelled at any time by the Assured; or it may

be cancelled by the Company on fifteen (15) days' written notice thereof mailed to the Assured. If this policy shall be cancelled or become void or cease, the deposit premium having been paid, the balance of the deposit premium not yet earned shall be returned to the Assured.

Subject to all terms, conditions and warranties of the policy to which this rider is attached.

Attached to and forming part of Policy No. FC 1423 of the Franklin Fire Insurance Company, issued to B. R. Morris DBA Rifkin and Sons at its San Francisco, California Agency.

Date of Endorsement Sept. 14, 1939.

NEWHOUSE AND SAYRE, INC.

By: G. E. JOHNSTONE,

Agent. [8]

This Policy Is Made and Accepted Subject to the Foregoing Stipulations and Conditions and to the Conditions Printed on the Back Hereof, Which Are Hereby Specially Referred to and Made a Part of This Policy, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this Company shall have power to waive or be deemed to have waived any provision or condition of this policy unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the Assured unless so written or attached.

In Witness Whereof, this Company has executed and attested these presents, but this policy shall not be valid unless countersigned by a duly authorized Agent of the Company.

W. KURTH,

President.

H. O. SMITH,

Secretary.

Countersigned at San Francisco, Calif. this 14th day of September, 1939.

G. E. JOHNSTONE,

Agent. [9]

Newhouse and Sayre, Inc.

General Agents

Inland Marine—All Risks

116 John Street, New York, N. Y.

Insurance Exchange, Chicago, Illinois

417 Montgomery St., San Francisco, Cal.

548 S. Spring St., Los Angeles, Cal.

421 Walnut St., Philadelphia, Pa.

431 Leader Bldg., Cleveland, Ohio

General Conditions

1. It is warranted by the Assured that this insurance shall in no wise inure directly or indirectly to the benefit of any carrier or other bailee.

2. If there is any other insurance covering the property insured hereunder, whether prior, subsequent to, or simultaneous with this insurance, which

in the absence of this insurance would cover the loss or damage hereby covered, then this Company shall not be liable hereunder for more than the excess over and above such other insurance. This clause, however, shall not apply to insurance effected by a customer or a member of the family of a customer of the Assured, and the existence of such insurance, or payment of a loss thereunder, shall not constitute a defense to any claim otherwise payable under this policy, nor shall such insurance be called on to contribute to any loss payable hereunder.

3. The Assured shall immediately report to this Company or its Agent every loss or damage which may become a claim under this policy, and also shall file with this Company or its Agent within ninety (90) days from date of loss, a detailed sworn proof of loss. Failure by the Assured to report the said loss or damage and to file such written proofs of loss as herein provided, shall invalidate any claim under this policy.

4. In case of loss or damage it shall be lawful and necessary for the Assured, his or their factors, servants and assigns, to sue, labor and travel for, in and about the defense, safeguard and recovery of the property insured hereunder, or any part thereof, without prejudice to this insurance; nor shall the acts of the Assured or this Company in recovering, saving and preserving the property insured in case of loss or damage, be considered a waiver or an acceptance of abandonment; to the charge whereof, this Company will contribute ac-

according to the rate and quantity of the sum herein insured.

5. The Assured shall submit, and so far as is within his or their power shall cause all other persons interested in the property and members of the household and employees to submit, to examinations under oath by any persons named by the Company, relative to any and all matters in connection with a claim, and shall produce for examination all books of account, bills, invoices, and other vouchers or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by the Company or its representatives, and shall permit extracts and copies thereof to be made.

6. All adjusted claims shall be paid or made good within thirty (30) days after presentation and acceptance of satisfactory proofs of interest and loss at the office of this Company. No loss shall be paid hereunder if the Assured has collected the same from others.

7. It is a condition of this policy that no suit, action or proceeding for the recovery of any claim under this policy shall be maintainable in any court unless the same be commenced within twelve (12) months next after the calendar date of the happening of the physical loss or damage out of which the said claim arose. Provided, however, that if by the laws of the state within which this policy is issued such limitation is invalid, then any such claim shall be void unless such action, suit or proceeding be

commenced within the shortest limit of time permitted, by the laws of such state, to be fixed herein.

Furriers' Customers Basic Policy

Expires—Continuous Until Cancelled

Name of Assured, B. R. Morris DBA Rifkin and Sons

Amount, \$20,000.00

Premium, \$50.00

No. FC 1423

The Franklin Fire Insurance Company of
Philadelphia, Pennsylvania

The Green-Campbell Co.

Insurance

541 So. Spring St.

[Illegible]

Los Angeles, Cal.

It is important that the written portions of all policies covering the same property read exactly alike. If they do not, they should be made uniform at once. [10]

State of California,
County of Los Angeles—ss.

B. R. Morris being by me first duly sworn, deposes and says: That.....he is the Plaintiff in the foregoing and above entitled action; that.....he has.....read the foregoing Complaint (Insurance Policies) and knows the contents thereof; and that the same

is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that.....he believes it to be true.

B. R. MORRIS

Subscribed and Sworn to before me this 6th day of August, 1940.

[Notarial Seal] CELIA L. FEINTECH,
Notary Public in and for said County and State.
My Commission Expires Oct. 17, 1943.

[Endorsed]: Filed Aug. 7, 1940. [11]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, Franklin Fire Insurance Company of Philadelphia, Pennsylvania, and in answer to the plaintiff's complaint herein, admits, denies and alleges as follows:

I.

Denies each and every, all and singular, generally and specially, the allegations contained in Paragraph I.

II.

Denies each and every, all and singular, generally and specially, the allegations contained in Paragraph II.

III.

Denies each and every, all and singular, generally and specially, the allegations contained in Paragraph V, except that defendant admits that plaintiff is a citizen of the State of California and that the defendant, Franklin Fire Insurance Company of Philadelphia, Pennsylvania is a citizen of the State of Pennsylvania. This answering defendant specifically denies that the amount in controversy is or exceeds, exclusive of interest and costs, the sum of \$3,000.00. [12]

IV.

Admits that on the 14th day of September, 1939, this answering defendant executed and delivered to the plaintiff herein a policy of insurance a copy of which is attached to the plaintiff's complaint herein and marked as Exhibit "A" thereof, but denies that plaintiff paid to the defendant the sum of \$50.00 or any other sum or at all for premium in connection therewith, but to the contrary alleges that there was deposited with the defendant the sum of \$50.00 as premium deposit only; that on or about the 19th day of February, 1940, the entire amount of \$50.00 premium deposit was by this answering defendant returned to the plaintiff and accepted by the plaintiff; that this answering defendant has never received and has not received any premium payment whatsoever or at all in connection with the issuance of said policy; that, in addition thereto, said policy was on the 27 day of January, 1940, cancelled and

said policy ever since said date has been and is of no force or effect whatsoever or at all;

This answering defendant further denies that by the terms of said policy this answering defendant did insure the plaintiff or the defendants, or any of the defendants named herein, either from the 14th day of September, 1939, at noon, or from any other time or at all, until cancellation of said insurance, or for any other length of time, or at all, whether as in said policy provided or otherwise, against all or any loss or damage by fire, or otherwise, to an amount as in the policy provided, or in any other amount or amounts whatsoever or at all, as to the personal property or any other property of any kind or nature as described in said policy or otherwise. This defendant further denies that it was the intention of the plaintiff and/or this answering defendant that said policy of fire insurance was to cover customers' furs or any furs and/or garments, whether trimmed with fur or otherwise, whether in the possession of plaintiff or otherwise or at all, [13] except under and pursuant to the terms, covenants, conditions and provisions of said policy, Exhibit "A" attached to the plaintiff's complaint.

V.

In answer to Paragraph VII, denies each and every, all and singular, generally and specially, the allegations contained therein, and specifically in this connection alleges that this answering defendant issued and intended to issue only the policy of

insurance attached to plaintiff's complaint as Exhibit "A", and that said policy was the actual policy that this answering defendant intended to execute and issue, and that neither this answering defendant nor the plaintiff intended any other contract or policy of insurance subject to any different or other or lesser terms, covenants or conditions than as actually set forth in said contract, Exhibit "A" attached to plaintiff's complaint.

VI.

Denies each and every, all and singular, generally and specially, the allegations contained in Paragraph VIII.

VII.

In answer to Paragraph IX, this answering defendant denies that the plaintiff was not aware of the provisions and each of the provisions contained in said policy attached to plaintiff's complaint as Exhibit "A" thereof, and denies that said provisions and each of them were not called to the attention of plaintiff. Admits that no forms or receipts were furnished by this answering defendant to the plaintiff, but denies that it is customary or usual to furnish such forms under such policy where the terms are intended to be enforced as part of the policy or otherwise or at all; but, to the contrary, all forms and all receipts to be used by the plaintiff under and in connection with the terms, covenants, conditions and provisions of the policy, Exhibit "A" of plaintiff's complaint, were to have

been and should have been provided by the plaintiff [14] and not by this defendant.

Further answering said Paragraph IX, this answering defendant denies that the plaintiff, pursuant to the terms of the above policy, or otherwise, or at all, reported to this defendant not later than the fifteenth day of every month or at any other time or at all the total amount or any risk under said policy on the last day of the preceding month or any other time or at all, and in this connection alleges that there could have been no report of any amount at risk under said policy at any of the times in the complaint mentioned for the reason that at no time was any amount at risk.

Further answering said paragraph, this defendant alleges that while the plaintiff pretended to report certain amounts at risk for the months of September, October, November and December, actually said reports were false and untrue for the reason that the plaintiff had failed, neglected and refused at any time to comply with the terms, covenants, conditions and provisions of said policy, and that while the plaintiff had, under the terms of said policy, Exhibit "A", agreed to pay premiums as therein provided, that it had not agreed to pay any premiums under said policy up to date of cancellation, to-wit, January 27th, 1940, for the reason that no insurance had been effected thereunder. That it is not true that this defendant accepted said reports and/or charged any premiums for insurance on the items

reported, whether same is deemed to have been inclusive or exclusive of the items sued upon hereunder; that this answering defendant has at all times since the date of the issuance of said policy up to the date of its cancellation insisted upon a full and complete compliance with all the terms, covenants, conditions and provisions thereof, and has never in any wise or manner whatsoever waived or surrendered its rights to enforce compliance therewith and of each and every term, covenant, condition and provision thereof. [15]

VIII.

In answer to Paragraph X, alleges that this answering defendant has no information or belief upon the subject sufficient to enable it to answer the allegations therein contained, and placing *hits* denial on that ground, denies each and every, all and singular, generally and specially, the allegations therein contained.

IX.

In answer to Paragraph XI, denies each and every, all and singular, generally and specially, the allegations therein contained, save and except that this answering defendant admits that on or about the 22nd day of January, 1940, plaintiff herein gave to this answering defendant a purported sworn proof of loss, but denies that the same showed in detail or otherwise or at all the total or any loss and/or value of any personal property or other property covered by the policy sued upon herein,

Exhibit "A" to plaintiff's complaint and/or showing the amount payable to the plaintiff under said policy of \$6720.00 or any other sum or at all, save and except in this connection this answering defendant admits that said purported proof of loss set forth certain claimed items of personal property which were claimed to have been lost and destroyed in a fire, but which items this answering defendant alleges were not covered by policy of insurance referred to in Exhibit "A" of plaintiff's complaint; and specifically denies that said proof of loss was true or correct and specifically further denies that there was any loss sustained under or in connection with the policy referred to in plaintiff's complaint, Exhibit "A" thereof.

This answering defendant further denies that plaintiff has performed all or any of the conditions of said policy, Exhibit "A" of plaintiff's complaint on the plaintiff's part to be performed.

X.

In answer to Paragraph XII, this answering defendant denies each and every, all and singular, generally and specially the [16] allegations therein contained, save and except that this answering defendant admits that said defendant has failed and refused, and still fails and refuses to pay the amount of \$6720 or any other sums or amounts whatsoever or at all, either to the plaintiff or to anyone whomsoever.

For a Further, Separate and Affirmative Defense to Plaintiff's Complaint, this answering defendant alleges that the complaint herein fails to state facts sufficient to constitute a cause of action or any cause of action herein.

For a Further, Separate and Second Affirmative Defense to plaintiff's complaint, this answering defendant alleges that no mutual mistake of fact ever existed between the plaintiff and this answering defendant; that the policy of insurance, copy of which is attached to plaintiff's complaint as Exhibit "A", in all respects and particulars conforms to the order for insurance made by the plaintiff to this answering defendant and pursuant to which said policy was issued; that said policy embodies the only agreement this defendant ever intended to execute; that plaintiff at all times knew the terms, covenants, conditions and provisions of said contract, Exhibit "A" hereof, exactly as set forth in said Exhibit "A" of plaintiff's complaint; that if any mistake occurred, same was not mutual but was unilateral on the plaintiff's part alone, and such mistake, if any, was at all times unknown to this defendant.

And for a Further, Separate and Third Affirmative Defense, to plaintiff's complaint, this answering defendant alleges that since the date of issuance of said policy, to-wit, September 14, 1939, said policy has been in the possession of the plaintiff; that at all times since the issuance thereof said policy has been exactly as photostatically shown in Exhibit

“A” of plaintiff’s complaint, and the plaintiff knew at all times from the date of issuance thereof [17] the terms, covenants, conditions and provisions thereof; that, notwithstanding, the plaintiff has at no time notified this answering defendant of any alleged variance between the alleged intention of the plaintiff and the plain and express terms, covenants conditions and provisions of said policy; that at no time until the filing of the complaint herein did the plaintiff advise this answering defendant that said policy was allegedly not in conformity with the intention of the plaintiff; that such failure to notify this answering defendant of said alleged failure to said policy to express the intention of the plaintiff, if in fact it did fail to so do, constitutes laches on the part of the plaintiff, whereby plaintiff is estopped from asserting that he did not know the contents of said policy and that the same did not embody the alleged intended agreement of the plaintiff or the parties.

And for a Further, Separate and Fourth Affirmative Defense to plaintiff’s complaint, this answering defendant alleges that at all times since the execution of said policy, to-wit, on the 14th day of September, 1939, the plaintiff herein has been in possession thereof, all as photostatically set forth in Exhibit “A” of plaintiff’s complaint; that but a casual inspection of said policy at any time from the date of the issuance thereof would have informed plaintiff of the terms, covenants, conditions and provisions thereof, and that same did not, if it

be a fact that it did not, express the intention of the plaintiff; that this answering defendant was never at any time aware of any other or different intention of the plaintiff than as expressed in said contract Exhibit "A" of plaintiff's complaint; that if the plaintiff did not know of the terms, covenants, provisions and conditions of said policy, such failure on his part was due to his own negligence and failure to exercise reasonable care and diligence, or any care and diligence in reading said contract or in detecting the existence of his own [18] alleged error; that such negligence on the part of the plaintiff constitutes laches and plaintiff is estopped from asserting his ignorance of the contents of said policy, Exhibit "A" of the complaint herein, and from denying that said policy embodies the true agreement of the parties.

And for a Further, Separate and Fifth Affirmative Defense to plaintiff's complaint, this answering defendant alleges that prior to the commencement of the action herein said policy was cancelled according to the terms and conditions thereof and all premium deposits returned to the plaintiff by this answering defendant, and the plaintiff accepted said return of premium deposit; that said policy was never placed in effect so far as causing any insurance risk to be attached, and the plaintiff, by accepting the return of said premium deposit in full and paying no premiums at all to the defendant in connection with said policy, acquiesced in the said fact and is estopped to assert any claim thereunder.

And for a Further, Separate and Sixth Affirmative Defense to plaintiff's complaint, this answering defendant alleges that on the 27th day of January, 1940, said policy according to its terms and conditions, was cancelled and rescinded by the plaintiff, and ever since said date said policy has been of no force or effect whatsoever or at all; that, by virtue thereof, and by virtue of the fact that no action was instituted herein by the plaintiff or by any of the alleged beneficiaries thereunder, plaintiff and any and all alleged beneficiaries thereunder have no right, claim, interest or demand of any kind under said policy; that, therefore, irrespective of any other claims of the plaintiff hereunder, any decision in this cause would constitute an adjudication of a moot controversy.

And for a Further, Separate and Seventh Affirmative Defense, to plaintiff's complaint, this answering defendant alleges that the [19] present action is not maintained in the names of the true parties in interest; that the plaintiff, as such, has no right, demand or interest under said policy, Exhibit "A" to plaintiff's complaint; that the alleged beneficiaries, if any, have not made any demand or instituted any action in connection with any asserted or alleged rights thereunder; that, moreover, on the face of the complaint it appears that all of the alleged beneficiaries under said policy, even assuming there were any beneficiaries thereunder, or that there was a valid policy in effect, are not made parties to the proceedings herein.

And for a Further, Separate and Eighth Affirmative Defense to plaintiff's complaint, this answering defendant alleges that the plaintiff herein at all times herein mentioned has failed, neglected and refused, and still fails, neglects and refuses to register or file with the Clerk of the County of Los Angeles, State of California, in which the principal place of business of plaintiff is and was at all times herein mentioned located, a certificate stating the name in full and the place of residence of such person operating a business under a fictitious firm name or style, and has failed, neglected and refused to publish such certificate in the manner provided by the law of the State of California; that in this connection plaintiff has and did at all times herein mentioned fail, neglect and refuse to comply with the provisions of sections 2466 and 2468 of the Civil Code of the State of California whereby and by reason whereof plaintiff is not entitled to maintain this action or any action herein.

Wherefore, this answering defendant prays that the plaintiff's prayer for relief hereunder be denied; that the plaintiff take nothing by his complaint herein; and that this defendant be awarded judgment for costs of suit herein.

JOSEPH F. RANK,

Attorney for defendant, Franklin Fire Ins. Co. [20]

State of California,
County of Los Angeles—ss.

Joseph F. Rank being by me first duly sworn, deposes and says: that he is the attorney of The Franklin Fire Ins. Co. of Philadelphia, Pennsylvania, one of the defendants in the above entitled action; that he has read the foregoing answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true. That he makes this verification for and in behalf of said corporation; that there is no officer of said defendant corporation present within the County of Los Angeles, where affiant has his office and for that reason affiant makes this verification.

JOSEPH F. RANK

Subscribed and sworn to before me this 10th day of Sept. 1940.

[Seal] ELIZABETH G. STOREY,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires March 15th, 1944.

[Endorsed]: Filed Sep. 10, 1940. [21]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR CONTINUANCE

To the Defendant The Franklin Fire Insurance
Company of Philadelphia, Pennsylvania, and
to Joseph A. Rank, Its Attorney:

You and each of you will please take notice that on Monday, March 31, 1941, at the hour of 10:00 o'clock A. M. before the Honorable J. F. T. O'Connor, in the Federal Building, Los Angeles, California, the plaintiff in the above entitled action will move the Court to vacate the former order of the Court setting the above matter for trial on April 25, 1941, and to either order said matter off calendar or to continue the trial of said matter to some period of time after April 25, 1941. Said motion will be based upon the pleadings, records and files of the within action and upon the affidavit of Edward K. Zuckerman accompanying this notice.

ZUCKERMAN AND STEIN

By EDWARD K. ZUCKERMAN

EDWARD K. ZUCKERMAN

[Endorsed]: Filed Mar. 26, 1941. [22]

[Title of District Court and Cause.]

AFFIDAVIT OF EDWARD K. ZUCKERMAN
IN SUPPORT OF MOTION FOR
CONTINUANCE

State of California,
County of Los Angeles—ss.

Edward K. Zuckerman, being first duly sworn on oath deposes and says: That he is one of the attorneys for the plaintiff in the above entitled action and is the attorney who prepared the pleadings in the above action and is most familiar with the facts of plaintiff's case; that the trial in the above action is now set for April 25, 1941, and affiant believes the trial of the above matter should be continued to some later future date or be placed off calendar entirely, to be reset for hearing some time in the future, for the following reasons:

The nature of plaintiff's action is to recover on an insurance policy for fire damage and loss to merchandise of customers in a place of business conducted by plaintiff. That the said policy of insurance contains a one year period of limitation to sue thereon. The policy covers "loss of or damage to the insured property, including the assured's legal liability therefor". The within action was filed within the necessary one year period. However said one year period has since expired. Plaintiff named numerous fictitious defendants in the within action with the [23] thought that the customers who suffered the actual fire loss would join in this action

and set forth their loss in an effort to recover the same from the defendant herein. However to date none of said customers have done so. Plaintiff believes that he is unable to serve said customers as defendants so as to force them to state their position in this action, since to do so would be to create party defendants who are citizens of the same state as plaintiff, thereby defeating the jurisdiction of the Federal Court and barring plaintiff from any future recovery by reason of the one year period of limitations set forth in said insurance policy; that plaintiff has no way of knowing what his legal liability is under said policy until he has determined the same with said customers. Affiant believes that within the next several months said customers will ask leave to intervene as parties plaintiff in the within action, and that in such manner the rights of all parties concerned may be determined by the within action. However, affiant believes that plaintiff, having been required to file the within action within a one year period, due to the limitation period contained in defendant's policy, should not be required by defendant to proceed to trial before plaintiff can properly ascertain plaintiff's actual loss and legal liability so as to properly introduce into evidence plaintiff's claims against defendant.

Affiant at the present time is engaged in the above court in the trial of an action entitled Joseph I. Siegel, etc. v. J. W. Oakley, Case No. 371-B, which said cause is set for trial on March 25, 1941., Affiant, together with other counsel, has been devoting prac-

tically his exclusive time to the preparation of said case for the past several months. This trial date was originally set for March 21, 1941. However, the trial court, on its own motion continued the date to March 25, 1941, and also informed counsel that the case could not be tried continuously but would [24] have to be interrupted on several occasions for periods of a few days to a week. Hence affiant avers that the trial of said action may extend well beyond a period of two months. This trial date will either overlap or come so close to the date set for trial in the within action that affiant will be unable to spend any time preparing for the trial of the within action. That in addition to the reasons above set forth affiant believes that in any event the trial of the within action should be continued for a period of several months so as to allow affiant to properly prepare for the trial of the within action.

In addition, it should be noted that defendants' Seventh affirmative defense, as pleaded in defendants' answer, alleges that the present action is not maintained in the names of the true party in interest, and the beneficiaries under the policy, if any, are not made parties to the proceedings herein. As set forth in the earlier part of this affidavit, the possibility that such a defense might be good at the present time as a plea in abatement places plaintiff in a position where it is necessary in justice and in equity to continue the trial of the present action until such time as plaintiff's legal liability can be

ascertained, or until the proper parties intervene in the present action.

Wherefore affiant prays that the trial date of April 25, 1941, heretofore set by the above Court be vacated and that said matter be placed off calendar, or, that in the alternative, said date of trial be continued for at least a period of several months.

EDWARD K. ZUCKERMAN

Subscribed and Sworn to before me this 25th day of March, 1941.

[Seal]

CELIA L. FEINTECH,

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires Oct. 17, 1943.

[Endorsed]: Filed Mar. 26, 1941. [25]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR DISMISSAL

To the Plaintiff above named, and to his attorneys,
Messrs. Zuckerman & Stein:

You and Each of You Will Please Take Notice that on Monday, September 22nd, 1941, at the hour of 10 o'clock A. M., of that day, or as soon thereafter as counsel can be heard, in the Federal Court House and Post Office Building, before the Honorable Leon R. Yankwich, Judge Presiding, the defendant herein, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, will move the

above entitled Court for its order dismissing with prejudice the action herein.

Said motion will be made on the grounds that it appears from the complaint herein and the other papers and documents on file, particularly from the affidavit of Edward K. Zuckerman in support of motion for continuance, which affidavit is dated March 25th, 1941, that there is no diversity of citizenship between the plaintiff and the defendants, and hence that this Honorable Court is without jurisdiction.

Said motion will be based upon this notice of motion, [29] upon the affidavit of Joseph F. Rank filed herewith, and upon all papers and records on file herein, particular attention being called to the affidavit of Edward K. Zuckerman filed in support of motion for continuance herein and dated March 25th, 1941.

Dated: September 10th, 1941.

JOSEPH F. RANK,
Attorney for Defendant The Franklin Fire Insurance Company of Philadelphia, Pennsylvania.

[Endorsed]: Filed Sep. 12, 1941. [30]

[Title of District Court and Cause.]

AFFIDAVIT OF JOSEPH F. RANK IN
SUPPORT OF MOTION FOR
DISMISSAL

State of California,
County of Los Angeles—ss.

Joseph F. Rank, being first duly sworn, deposes and says: That he is the attorney for The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, one of the defendants herein.

Affiant is informed and believes and therefore alleges that the named defendants, other than The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, are residents of the State of California, the alleged residence of plaintiff, in fact said named defendants all being purported customers of the plaintiff. That in this respect no allegation is made in the complaint to the effect that the defendants named, other than The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, are citizens of any state other than the State of California.

That as a matter of fact, a sworn proof of loss was rendered to the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, by B. R. Morris, plaintiff herein, on January 25, 1940, in which the address of the defendant, John Castalet, was listed as 1043 South Mansfield Avenue, Los Angeles, [31] California, and in which the address of defendant Jane Van Deusen was listed as

3499 Sawtelle Avenue, Los Angeles, California, and the address of defendant P. C. Gernet was listed as 618 North Alt Drive, Beverly Hills, California, and in which the address of Mrs. Slate (apparently defendant Jane Slate) was listed as in care of Bardin's Sportswear, 714 South Los Angeles Street, Los Angeles, and in which the address of Elenore Staples (apparently defendant Elenore Staples Boehner) was listed as 622 South Hobart Street, Los Angeles, California, and in which the address of Mrs. Sheldon Hymer (apparently defendant Sheldon W. Hymer) was listed as 1436 Beverly Glen Drive, Beverly Hills, California.

That in addition thereto the attorney for the plaintiff herein did on the 25th day of March, 1941, make an affidavit in support of motion for continuance, which is on file in the cause herein, in which affidavit said Edward K. Zuckerman states that the various defendants herein are customers of the plaintiff who may claim loss, and that they were in fact contemplating to be joined as defendants in order that they might state their position in the case, and that they are citizens of the State of California, and that hence, he has now realized that he cannot serve them as to do so would defeat the jurisdiction of this Honorable Court.

Therefore, affiant represents and shows that there is no diversity of citizenship between the plaintiff and all the defendants, and hence there is no jurisdiction of this Honorable Court.

JOSEPH F. RANK

Subscribed and Sworn to before me this 10th day of September, 1941.

[Seal]

ETHEL HICKEY,

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Sep. 12, 1941. [32]

At a stated term, to wit: The September Term, A. D. 1941, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 22nd day of September in the year of our Lord one thousand nine hundred and forty-one.

Present:

The Honorable: Leon R. Yankwich, District Judge.

No. 1099-Y Civil

B. R. MORRIS, doing business as L. RIFKIN & SONS,

Plaintiff,

vs.

THE FRANKLIN FIRE INSURANCE CO. OF
PHILADELPHIA, PENNSYLVANIA,
Defendant.

This cause coming on for hearing motion of defendant The Franklin Fire Insurance Company of

Philadelphia, Pennsylvania, for an order dismissing the action with prejudice; Edw K. Zuckerman, Esq., appearing as counsel for the plaintiff; Joseph F. Rank, Esq., appearing as counsel for the defendant:

Attorney Rank presents the said motion and Attorney Zuckerman moves to file amended complaint, which is denied. The motion of defendant Franklin Fire Insurance Co., etc., is granted on the grounds of no diversity of citizenship. [33]

In the District Court of the United States
Southern District of California'

Central Division

No. 1099-Y Civil

B. R. MORRIS, doing business as L. RIFKIN &
SONS,

Plaintiff,

vs.

THE FRANKLIN FIRE INSURANCE COM-
PANY OF PHILADELPHIA, PENNSYL-
VANIA, JANE COLLETI, JOHN CASTA-
LET, JANE VAN DEUSEN, P. C. GERNET,
T. GROSSMAN, SHELDEN W. HYMER,
JANE SLATE, ELENORE STAPLES
BOEHNER, Et Al.,

Defendants.

ORDER OF DISMISSAL

Be It Remembered, that the motion of the de-
fendant, The Franklin Fire Insurance Company of

Philadelphia, Pennsylvania, for dismissal of the action herein, came on regularly to be heard in the Courtroom of the Honorable Leon R. Yankwich, Judge Presiding, in the United States Post Office and Court House Building, Los Angeles, California, on the 22nd day of September, 1941, the plaintiff being represented by his counsel, Messrs. Zucker-
man & Stein, by Arthur E. Stein, and defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, being represented by its attorney, Joseph F. Rank, and due notice thereof having been given, said motion for dismissal was duly considered by the Court, and it appearing to the Court that this Court lacked jurisdiction of said action, said motion was by the Court granted.

Pursuant thereto, It Is Hereby Ordered, Adjudged and Decreed that judgment of dismissal be entered in the cause herein, and that the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, have and recover of the plaintiff its costs of suit incurred herein, taxed in the sum of \$11.00.

Done in Open Court this 24th day of September, 1941.

LEON R. YANKWICH,
Judge.

[Endorsed]: Filed Sep. 24, 1941. Judgment entered Sep. 24, 1941. Docketed Sep. 24, 1941. Book 6, Page 634. [34]

[Title of District Court and Cause.]

NOTICE OF MOTION TO VACATE ORDER OF
DISMISSAL, FOR LEAVE TO FILE AN
AMENDED COMPLAINT AND FOR
LEAVE TO RE-ALIGN PARTIES DE-
FENDANT AS PARTIES PLAINTIFF OR,
IN THE ALTERNATIVE, TO DISMISS AS
TO CERTAIN DEFENDANTS.

To the Defendant, The Franklin Fire Insurance
Company of Philadelphia, Pennsylvania, and to
Joseph F. Rank, Its Attorney:

You, and Each of You, Will Please Take Notice
that on Monday, the 3rd day of November, 1941,
at the hour of 10:00 o'clock A. M. in the Court
Room of the Honorable Leon R. Yankwich in the
Federal Building, Los Angeles, California, or as
soon thereafter as counsel can be heard, plaintiff
herein will move the court as follows:

(a) To vacate and set aside the order of dis-
missal of this action heretofore made by this Court
on the 22nd day of September, 1941:

(b) To allow plaintiff to file an amended com-
plaint, a copy of which proposed amended com-
plaint is served and filed herewith;

(c) To allow plaintiff to dismiss from the within
action all defendants other than the defendant, The
Franklin Fire Insurance Company of Philadelphia,
Pennsylvania, or, in the alternative, for an order
of the Court re-aligning said defendants, other than
the defendant, The Franklin Fire Insurance Com-

pany of Philadelphia, Pennsylvania, as parties plaintiff in this action in place and in [35] stead of their present status as parties defendant.

Said motion will be based upon the records, files and pleadings of the within action, upon this notice, upon the affidavit of Arthur Edmund Stein accompanying this notice, and upon the proposed amended complaint accompanying this notice.

Said motion will be based upon the grounds that all defendants, with the exception of the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, are not indispensable or necessary parties to this action; that a new trial or hearing of this motion should be granted plaintiff upon the ground that said order of dismissal was taken against plaintiff through surprise, mistake and excusable neglect; and upon the grounds and reasons disclosed in the records, files, pleadings and documents on file in the above cause and filed herewith.

ZUCKERMAN AND STEIN
By ARTHUR EDMUND STEIN

[Endorsed]: Filed Oct. 23, 1941. [36]

[Title of District Court and Cause.]

AFFIDAVIT OF ARTHUR EDMUND STEIN
IN SUPPORT OF MOTION TO VACATE
ORDER OF DISMISSAL FOR LEAVE TO
FILE AN AMENDED COMPLAINT AND
FOR LEAVE TO RE-ALIGN PARTIES
DEFENDANT AS PARTIES PLAINTIFF
OR, IN THE ALTERNATIVE, TO DISMISS
AS TO CERTAIN DEFENDANTS.

State of California,
County of Los Angeles—ss.

Arthur Edmund Stein, being first duly sworn,
deposes and says:

That he is one of the attorneys for the plaintiff herein; that the original complaint on file herein names as defendants the Franklin Fire Insurance Company of Philadelphia, Pennsylvania, and numerous other parties by name and some by fictitious names. It is alleged in said complaint that the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, issued its policy, a copy of which is attached to and made a part of said complaint, whereunder said defendant insured plaintiff and all defendants except said defendant insurance company. It is further disclosed in said complaint that plaintiff was holding the personal property destroyed by fire as bailee, and it is stated that all defendants except the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, are joined as parties defendant since

the insurance was for the benefit of said defendant and this lawsuit was brought on behalf of said defendants. [38]

It has at all times since the filing of the within action been the intention of plaintiff herein to recover for the loss of the personal property described in said complaint and to hold said sums recovered for the benefit of and to pay the same to the individual parties who placed the same in the hands of plaintiff as bailee. This intention is disclosed in the complaint and in the affidavit of Edward K. Zuckerman on file herein in support of a motion for continuance.

Further, the policy of insurance itself, which is a part of said complaint, states that the Franklin Fire Insurance Company of Philadelphia, Pennsylvania, insures "B. R. Morris dba Rifkin & Sons, hereinafter called the assured;" the policy does not state that any other parties are insured. The answer of the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, on file herein, admits the execution and delivery to plaintiff of said policy.

Hence, it is submitted that the pleadings and all documents on file clearly show, and have at all times herein shown, that the plaintiff and the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, are the only necessary parties to the present action and that the remaining defendants should properly either be dismissed or re-aligned as parties plaintiff.

A motion for dismissal of the within action on the grounds of lack of jurisdiction was heretofore made and heard before this Court on the 22nd day of September, 1941. An affidavit of Joseph F. Rank, filed in support of said motion, was not controverted by plaintiff and no counter-affidavits were filed since affiant believed that the facts therein alleged were correct and that the conclusions therein alleged, while incorrect, were mere conclusions and not binding. Further, affiant intended to and did move in open Court at the time of the hearing of said motion for [39] leave to dismiss all defendants except the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, from the within action and for leave to file an amended complaint, which was at that time presented to the Court and which is the same as that now proposed in the present motion. Said motions of plaintiff were denied and motion of defendant to dismiss was granted. Affiant believes that by surprise, mistake and excusable neglect plaintiff was thus prevented from furnishing to the Court additional proof that the defendants herein, other than the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, are not necessary parties to the action and should have been and should be dismissed or re-aligned as parties plaintiff.

ARTHUR EDMUND STEIN

Subscribed and sworn to before me this 22nd day of October, 1941.

[Seal] E. K. ZUCKERMAN,
Notary Public, in and for the County of Los Angeles, State of California.

My Commission Expires June 20, 1945.

[Endorsed]: Filed Oct. 23, 1941. [40]

[Title of District Court and Cause.]

AFFIDAVIT OF JOSEPH F. RANK IN RESPONSE TO AFFIDAVIT OF ARTHUR EDMUND STEIN IN SUPPORT OF MOTION TO VACATE ORDER OF DISMISSAL, ETC.

State of California,
County of Los Angeles—ss.

Joseph F. Rank, being first duly sworn, deposes and says:

That he is attorney for defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, herein; that the motion of plaintiff herein to vacate the order of dismissal insofar as it seeks leave to file an amended complaint and re-align the parties, and to dismiss as to certain defendants, is identically the same as the motion made in open Court by the plaintiff at the time of the granting of the motion to dismiss herein, to wit, on the 22nd day of September, 1941; that no legal showing is

made entitling the plaintiff to renew said motion; that the complaint herein as appears from the complaint [41] itself is an action to recover judgment in behalf of plaintiff and defendant owners as their rights may be established and is, in so many words, designed to recover for all parties beneficiary under the contract of insurance; that it is not a trust action nor an action for the benefit of third party beneficiaries under said contract of insurance.

That moreover, as alleged in said complaint, the policy while it insures B. R. Morris, the plaintiff, called the assured in the policy, also as alleged in the complaint, insures the various defendants as their interests may appear and as such is a third party beneficiary contract, and in fact, specifically so provides, and provides further that the insurance company may at its own option pay either to the assured or to the customers (third party beneficiaries) as, when and if liability accrues under said policy.

That while it is true that this Honorable Court may makes its order to re-align the parties, to do so would avail plaintiff nothing in this action, for if such were done, the Court would be without **jurisdiction for the reason** that the individual claims of the various beneficiaries would be less than the jurisdictional requirements, to wit, \$3,000.00.

It is respectfully submitted that the motion of plaintiff herein be denied.

JOSEPH F. RANK

III.

That at all times herein mentioned the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania, duly authorized and licensed to transact fire insurance business in the State of California and maintains an office in the County of Los Angeles, State of California.

IV.

That plaintiff is a citizen of the State of California, and the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, is a citizen of the State of Pennsylvania; that the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand and no/100ths (\$3,000.00) Dollars.

V.

That on the 14th day of September, 1939, the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, in consideration of the sum of Fifty and no/100ths (\$50.00) Dollars and premiums thereafter to be paid, executed and delivered to plaintiff its policy of insurance in writing known as Furriers' Customers Basic Policy in a provisional amount to the extent of Twenty Thousand and no/100ths (\$20,000.00) Dollars for merchandise located in storage rooms, vaults and safes and to the extent of Ten Thousand and no/100ths (\$10,000.00) Dollars for merchandise located out-

side of storage rooms, vaults and safes. Said policy bore No. FC-1423, and a copy of said policy is hereto attached and marked Exhibit "A" and hereby made a part of this complaint. That by the terms of said policy said defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, did insure said plaintiff from the 14th day of September, 1939, at noon, until cancellation of said insurance as in said policy provided, [44] as to the personal property described in said policy. That it was the intention of plaintiff and defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, that said policy of fire insurance was to cover customers' furs and garments trimmed with fur in the possession of plaintiff.

VI.

That through the mistake of plaintiff, which mistake the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, at that time knew or suspected, said policy of insurance did not truly express the intention of the parties in that said policy of insurance covered only customers' furs and garments trimmed with fur that were accepted from customers by the assured for storage, alteration, repairing, cleaning or remodeling, and for which the assured issued a receipt under which the assured agreed to effect insurance on such property; that it was the intention of plaintiff, which intention the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, at that time knew or suspected, not to limit

said insurance policy to such furs and garments for which the assured issued a receipt and under which the assured agreed to effect insurance on the property and not to limit the liability of said company under said policy to the amount stipulated in the assured's receipt as applying to each respective article, whether on account of the assured's legal liability or otherwise.

VII.

That said policy should be revised so as to express the intentions of the parties by excluding from the policy the following provisions, to-wit:

“This policy only covers Furs, or garments trimmed with Fur, being the property of customers, accepted by the Assured for storage, alteration, repairing, cleaning [45] or remodeling, and for which the Assured issues a receipt under which the Assured agrees to effect insurance on the property.

“This Company shall not be liable hereunder for more than the amount stipulated in the Assured's receipt as applying to each respective article, whether on account of the Assured's legal liability or otherwise.”

and in lieu of the above provisions insert the following provisions, to-wit:

“This policy only covers Furs, or garments trimmed with Fur, being the property of customers in the possession of plaintiff.”

VIII.

That plaintiff was not aware of the above provisions being in said policy and said provisions were not called to the attention of plaintiff. No proper forms or receipts were furnished to plaintiff by the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, although it is customary to furnish such forms under such a policy where the above terms are intended to be enforced as a part of the policy. That plaintiff pursuant to the terms of the above policy reported to the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, not later than the fifteenth day of every month the total amount at risk under said policy on the last day of the preceding month; that the amount so reported at risk included the items herein sued on and plaintiff agreed to pay premiums thereon at the rates in the policy provided; that said defendants, The Franklin Fire Insurance Company [46] of Philadelphia, Pennsylvania, accepted said reports and charged a premium for insurance on the items reported including the items sued hereunder. That by reason thereof plaintiff waived the above provisions in said policy and is estopped to rely thereon.

IX.

That on or about the 30th day of November, 1939, said property was greatly damaged by fire and a large part destroyed by fire. That plaintiff is informed and believes and therefore alleges that said personal property so destroyed was of the value

of Six Thousand Seven Hundred and Twenty (\$6,720.00) Dollars; that at the time of the loss said property belonged to customers of plaintiff and consisted of furs which had been accepted by plaintiff for storage, alteration, repairing, cleaning and remodeling, and was in the possession of plaintiff at 3926 Wilshire Boulevard, Los Angeles, California.

X.

That the loss and damage by reason of said destruction and damage was Six Thousand Seven Hundred and Twenty (\$6,720.00) Dollars; that plaintiff immediately gave written notice of said fire and of said loss to the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania; that on or about the 22nd day of January, 1940, and within sixty (60) days from the date of said loss, the insured rendered to the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, at its main office in California a sworn proof of loss showing in detail the total loss and value of the personal property covered by said policy of The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, and showing the amount payable to said plaintiff under said policy of Six Thousand Seven Hundred and Twenty (\$6,720.00) Dollars; that plaintiff has performed all the conditions of said policy on his part to be performed. [47]

XI.

That thirty (30) days after receipt of said proof of loss above set forth, to-wit, on the 22nd day of February, 1940, under the terms of said policy,

there became due and payable from said defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, to plaintiff the sum of Six Thousand Seven Hundred and Twenty (\$6,720.00) Dollars, together with interest thereon at the rate of seven (7%) per cent per annum from April 22, 1940, on account of and under said policy of insurance and that said defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, has refused and failed to pay said amount and has not paid any part of said loss to plaintiff.

Wherefore: Plaintiff prays judgment as follows:

1. That said policy of fire insurance be amended as above provided.

2. That plaintiff be given judgments against defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, in the sum of Six Thousand Seven Hundred and Twenty (\$6,720.00) Dollars, together with interest thereon at the rate of seven (7%) per cent per annum from April 22, 1940.

3. For his costs of suit and for such other and further relief as to the court seems just and proper in the premises.

ZUCKERMAN AND STEIN
By ARTHUR EDMUND STEIN
Attorneys for Plaintiff
ARTHUR EDMUND STEIN

[Clerk's Note: Exhibit "A" attached hereto is omitted as it is identical with Exhibit "A" to the Complaint, set forth at page 10 of this printed record.] [48]

State of California,
County of Los Angeles—ss.

B. R. Morris, being by me first duly sworn, deposes and says: That he is the Plaintiff in the foregoing and above entitled action; that he has read the foregoing complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

B. R. MORRIS

Subscribed and sworn to before me this 20th day of September, 1941.

(Notarial Seal) E. K. ZUCKERMAN

Notary Public in and for said County and State.
My Commission expires June 20, 1945.

[Endorsed]: Lodged Oct. 23, 1941. [52]

At a stated term, to wit: The September Term, A. D. 1941, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 3rd day of November in the year of our Lord one thousand nine hundred and forty-one.

Present: The Honorable Leon R. Yankwich,
District Judge.

No. 1099-Y Civil

B. R. MORRIS, doing business as L. RIFKIN &
SONS,

Plaintiff,

vs.

THE FRANKLIN FIRE INSURANCE CO. OF
PHILADELPHIA, PENN., et al.,
Defendants.

This cause coming on for hearing motion of plaintiff to: (a) set aside order of dismissal of September 22, 1941, (b) to allow plaintiff to file an amended complaint, (c) to allow plaintiff to dismiss from within action all defendants other than defendant The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, or in the alternative for an order re-aligning said defendants, other than the Franklin Fire Insurance Company of Philadelphia, Pennsylvania, as parties plaintiff, in this action in the place and instead of their present status as parties defendant; Joseph F. Rank, Esq., appearing as counsel for the defendant; A. E. Stein, Esq., appearing as counsel for the plaintiff:

Samuel Barchas, Esq. makes a statement and suggests that his motion, now set for a later date, and the above motion be heard at the same time.

Attorney Stein makes a statement and presents motion. Attorney Rank, in behalf of defendant, replies to Attorney Stein's motion, and Attorney Stein argues in rebuttal. The said motion is denied. MBk 23/316. [53]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO
CIRCUIT COURT OF APPEALS

Notice Is Hereby Given that the plaintiff above named hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the Order of the Court made October 22, 1941, entered in Civil Order Book 6, page 634, wherein the Court entered a Judgment of Dismissal against plaintiff, and from the Order of the Court made November 3, 1941, wherein the Court denied plaintiff's Motion to Vacate Order of Dismissal, for Leave to File an Amended Complaint and for Leave to Re-align Parties Defendant as Parties Plaintiff or, in the Alternative, to Dismiss as to Certain Defendants.

ZUCKERMAN AND STEIN,

By ARTHUR EDMUND STEIN,

ARTHUR EDMUND STEIN,

Attorneys for Plaintiff and
Appellant.

[Endorsed]: Mailed copies to Atty. for Deft., Joseph F. Rank, Esq., & to Samuel I. Barchas, in pro. per. E. L. S. 11/14/41. Filed Nov. 14, 1941.

[54]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, R. S. Zimmerman, Clerk of the District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 61 inclusive contain full, true and correct copies of Complaint; Answer of Defendant The Franklin Fire Insurance Company of Philadelphia; Plaintiff's Notice of Motion for Continuance; Affidavit of Edward K. Zuckerman; Order Transferring Case to Judge O'Connor; Stipulation and Order Continuing Trial; Notice of Trial; Notice of Motion for Dismissal; Affidavit of Joseph F. Rank; Order Denying Motion of Plaintiff for Leave to File Amended Complaint and Granting Defendant's Motion to Dismiss; Order of Dismissal; Notice of Motion to Vacate Order; Affidavit of Arthur Edmund Stein; Affidavit of Joseph F. Rank; Proposed First Amended Complaint; Order Denying Motion to Vacate Order; Notice of Appeal; Cost Bond on Appeal; Designation by Appellant of Record on Appeal; Designation by Appellee of Additional Portions of Record on Appeal; and Order Extending Time to Docket Appeal, which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I do further certify that the fees of the Clerk for comparing, correcting and certifying the foregoing record amount to \$10.40, which amount has been paid to me by the Appellant.

Witness My Hand and the seal of the said District Court, this 14th day of January, A. D. 1942.

(Seal) R. S. ZIMMERMAN,

Clerk.

By EDMUND L. SMITH,

Deputy.

[Endorsed]: No. 10024. United States Circuit Court of Appeals for the Ninth Circuit. B. R. Morris, doing business as L. Rifkin & Sons, Appellant, vs. The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed January 15, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10024

B. R. MORRIS, doing business as L. RIFKIN
& SONS,

Plaintiff and Appellant,

vs.

THE FRANKLIN FIRE INSURANCE COM-
PANY OF PHILADELPHIA, PENNSYL-
VANIA,

Defendant and Appellee.

STATEMENT OF POINTS AND DESIGNA-
TION OF THE PARTS OF THE RECORD
NECESSARY FOR THE CONSIDERATION
THEREOF.

Comes now the appellant and designates the fol-
lowing points that he will rely upon on appeal:

Point 1: The Court erred in finding that it lacked
jurisdiction of the action and in ordering a dismissal
of the action.

Point 2: The Court erred in denying appellant's
Motion to Vacate the Order of Dismissal.

Point 3: The Court erred in refusing to grant
plaintiff leave to file an Amended Complaint.

Point 4: The Court erred in refusing to realign
parties defendant as parties plaintiff or, in the
alternative, to dismiss as to certain defendants.

Pursuant to the rules of Practice of this Court, the appellant does hereby designate the following parts of the record as those to be contained in the record on appeal in the above entitled matter and upon which appellant relies:

1. Complaint.
2. Answer.
3. Notice of Motion for Continuance.
4. Affidavit of Edward K. Zuckerman in Support of Motion for Continuance.
5. Notice of Motion for Dismissal.
6. Affidavit of Joseph F. Rank in Support of Motion for Dismissal.
7. Minute Order of September 22, 1941.
8. Order of Dismissal entered in Civil Order Book 6, page 634.
9. Notice of Motion to Vacate Order for Dismissal, for Leave to File an Amended Complaint and for Leave to Realign Parties Defendant as Parties Plaintiff or, in the Alternative, to Dismiss as to Certain Defendants.
10. Affidavit of Arthur Edmund Stein in Support of Motion to Vacate Order of Dismissal, for Leave to File an Amended Complaint and for Leave to Realign Parties Defendant as Parties Plaintiff or, in the Alternative, to Dismiss as to Certain Defendants.
11. Affidavit of Joseph F. Rank in Response to Affidavit of Arthur Edmund Stein in Support of Motion to Vacate Order of Dismissal, etc.

12. Proposed First Amended Complaint.
13. Minute Order of November 3, 1941.
14. Notice of Appeal.
15. Statement of Points and Designation of the Parts of the Record Necessary for the Consideration Thereof.

Dated: January 12, 1942.

ZUCKERMAN AND STEIN,
By ARTHUR EDMUND STEIN,
ARTHUR EDMUND STEIN,
Attorneys for Plaintiff and
Appellant.

State of California,
County of Los Angeles—ss.

H. Goodman, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Los Angeles: that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business address is 1017 Pacific National Bldg., Los Angeles, California; That on the 12th day of January, A. D., 1942, affiant served the within Statement of Points and Designation of the Parts of the Record, etc. on the Assignee of Interest of Certain defendants in said action, by placing a true copy thereof in an envelope addressed to Mr. Samuel I. Barchas at the business address of said Samuel I. Barchas, as follows: Mr. Samuel I. Barchas, 1031 South Broadway, Los Angeles, Cali-

fornia, and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California; That there is delivery service by United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

H. GOODMAN

Subscribed and Sworn to before me this 12th day of January, 1942.

(Seal)

E. K. ZUCKERMAN,

Notary Public in and for said
County and State.

My Commission Expires June 20, 1945.

(AFFIDAVIT OF SERVICE BY MAIL—
1013a, C. C. P.)

State of California,
County of Los Angeles—ss.

H. Goodman, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the county of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within above entitled action; that affiant's business address is 1017 Pacific National Bldg., Los Angeles, California; that on the 12th day of January, 1942, affiant served the within Statement of Points and Designation of the Parts of the

Record, etc. on the Defendant and Appellee in said action, by placing a true copy thereof in an envelope addressed to the attorney of record for said Defendant and Appellee at the office address of said attorney, as follows: "Mr. Joseph F. Rank, Attorney at Law, 649 South Olive Street, Los Angeles, California"; and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California, where is located the office of the attorney for the person by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

H. GOODMAN

Subscribed and sworn to before me this 12th day of January, 1942.

(Seal)

E. K. ZUCKERMAN,

Notary Public in and for the
County of Los Angeles, State
of California.

My Commission Expires June 20, 1945.

[Endorsed]: Filed Jan. 15, 1942. Paul P. O'Brien,
Clerk.

No. 10024

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

B. R. MORRIS, doing business as L. RIFKIN & SONS,
Appellant,

vs.

THE FRANKLIN FIRE INSURANCE COMPANY OF PHILA-
DELPHIA, PENNSYLVANIA, a corporation,
Appellee.

APPELLANT'S OPENING BRIEF.

ZUCKERMAN AND STEIN,
ARTHUR EDMUND STEIN,
1017 Pacific National Building, Los Angeles,
Attorneys for Appellant.

FILED

APR 2 1942

PAUL E. THOMAS

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No. 10024

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

B. R. MORRIS, doing business as L. RIFKIN & SONS,
Appellant,

vs.

THE FRANKLIN FIRE INSURANCE COMPANY OF PHILA-
DELPHIA, PENNSYLVANIA, a corporation,
Appellee.

APPELLANT'S OPENING BRIEF.

JURISDICTION.

District Court.

The entire issue presented on this appeal is whether or not the District Court had jurisdiction of the action filed herein. Hence the point of jurisdiction is more fully discussed again later in this brief. The question of jurisdiction is here presented briefly in compliance with Rule 20 of the rules of this Court.

The complaint filed in the District Court alleges a cause of action for recovery on an insurance policy against the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania. It is alleged that plaintiff is a citizen of the State of California and the defendant insurance company is a citizen of the State of Pennsylvania. It is further alleged that the matter in controversy

exceeds, exclusive of interests and costs, the sum of \$3000.00. [Tr. p. 4.] The allegation concerning the citizenship of the parties is admitted in the answer of the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania. [Tr. p. 20.]

Under such facts it is claimed that the District Court had jurisdiction of the action pursuant to U. S. C. A. Title 28, Section 41, Division 1b. (*Judicial Code*, Section 24.)

Other parties are named defendants in the complaint. However, as to all other defendants, plaintiff alleges that this action is brought for and on behalf of such other defendants in that the insurance policy was issued by the defendant insurance company for the benefit of the remaining defendants. [Tr. p. 8.] Under the authorities and facts more fully discussed hereinafter, plaintiff submits that such allegations in the complaint do not interfere with the jurisdiction of the District Court.

Circuit Court.

Pursuant to motion, plaintiff's action was dismissed by the District Court on September 22, 1941, on the grounds of lack of jurisdiction in that no diversity of citizenship existed. [Tr. pp. 40-41.] Upon the hearing of this motion, plaintiff moved the Court for leave to file an amended complaint in which amended complaint only the defendant insurance company was named as a defendant and all other defendants were dropped from the action. This motion was denied at the time the order of dismissal was made. [Tr. pp. 41, 50-57.] Subsequently, on November 3, 1941, plaintiff moved to vacate the order of dismissal, to file said amended complaint, for leave to realign parties defendant as parties plaintiff, or in the alternative to dismiss as to certain defendants. This mo-

tion was denied by the District Court on November 3, 1941. [Tr. p. 58.] Under such circumstances, the judgment of dismissal and the refusal of the Court to grant plaintiff's motions constituted a final judgment in this action. Hence, plaintiff is entitled to appeal to this Court under the provisions of U. S. C. A. Title 28, Sections 225a and d (*Judicial Code*, Section 128 amended).

STATEMENT OF THE CASE.

The facts as disclosed by the pleadings and other documents on file are as follows: On August 7, 1940, plaintiff filed a complaint in the District Court against the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, and against some nine other named defendants and twenty defendants sued by fictitious names. The complaint was for recovery under an insurance policy. The allegations of the complaint were briefly as follows: That plaintiff is a citizen of the State of California; that the defendant insurance company is a citizen of the State of Pennsylvania. That the matter in controversy, exclusive of interests and costs, exceeds the sum of \$3000.00. That on September 14, 1939, the defendant insurance company issued to plaintiff its policy of insurance known as Furriers Customers Basic Policy, in the amount of \$20,000.00 for merchandise in storage rooms and \$10,000.00 for merchandise outside of storage rooms. A copy of the policy is attached to the complaint. That it was the intention of the plaintiff and defendant insurance company that said policy was to cover customers' fur garments in the possession of plaintiff; that through mistake said policy did not truly express the intention

of parties in that said policy covered only customers' furs left with plaintiff and for which plaintiff issued a receipt agreeing to effect insurance on such property; that the said policy should be reformed by eliminating the provisions requiring the issuance of a receipt by plaintiff to customers. That in any event, the defendant insurance company waived the provisions in said policy with reference to the issuance of a receipt; that on November 30, 1939, a fire occurred and fur garments belonging to customers of plaintiff and in the possession of plaintiff, to the value of \$6720.00 were destroyed by said fire. That said garments belonged to the defendants other than the defendant insurance company and that said individuals are by reason thereof joined as parties defendant; that said insurance was issued for the benefit of said defendants; that this lawsuit is brought for and on behalf of said defendants; that by reason of these facts, said defendant insurance company became indebted to plaintiff in the amount of \$6720.00, together with interest at seven per cent per annum from April 22, 1940. The prayer asks that the policy be amended as above provided; that plaintiff and defendant owners entitled thereto be given judgment against the defendant insurance company for the sum of \$6720.00, together with interest at seven per cent per annum from April 22, 1940, and for costs. [Tr. pp. 2-19.]

The defendant insurance company filed its answer on September 10, 1940. No other defendants were ever served or appeared in the action. Thereafter, on Septem-

ber 22, 1941, the defendant insurance company moved for a dismissal of the action on the grounds that it appeared from the complaint and from certain affidavits on file pertaining to a motion for continuance that no diversity of citizenship existed between plaintiff and certain of the defendants. [Tr. pp. 36-37.] At the hearing of the motion, counsel for plaintiff moved the Court for permission to file an amended complaint. This motion of plaintiff was denied and the motion for dismissal was granted. [Tr. pp. 40-41.]

Thereafter, a formal order of dismissal was filed and docketed on September 24, 1941. [Tr. pp. 41-42.] The amended complaint sought to be filed by plaintiff differed from plaintiff's original complaint in that the only defendant named therein was the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania. All other defendants were dropped and the allegations, that the action was brought for the benefit of and on behalf of the remaining defendants, were dropped. [Tr. pp. 50-57.]

Thereafter, on November 3, 1941, plaintiff moved the Court to vacate the order of dismissal, to allow plaintiff to file said amended complaint, to allow plaintiff to dismiss as to all defendants other than the defendant insurance company, or in the alternative for the Court to realign all defendants other than the defendant insurance company as parties plaintiff. [Tr. pp. 43-44.] This motion was denied. [Tr. p. 58.]

The cause of action had previously been set for trial on April 25, 1941. On March 26, 1941, plaintiff filed a notice of motion for continuance of said trial. [Tr. p. 32.] In support of said motion, one of plaintiff's counsel filed his affidavit in which he alleges, among other things, that plaintiff had named numerous defendants other than the defendant insurance company in the within action with the thought that the customers, who had suffered the actual fire loss, would join in this action and set forth their loss in an effort to recover the same; that none of said customers have done so; that plaintiff believes that he is unable to serve said customers as defendants since to do so would create party defendants who are citizens of the same state as plaintiff; that plaintiff should not be required to proceed to trial before properly ascertaining plaintiff's actual loss or legal liability to customers so as to be able to properly introduce plaintiff's claim against defendant. Other grounds for the continuance were likewise set forth in said affidavit. [Tr. pp. 33-36.]

In defendant's motion for dismissal, the grounds given were that it appears from the complaint and the other papers and documents on file, particularly from said last mentioned affidavit, that there is no diversity of citizenship between plaintiff and the defendants and, hence, the Court is without jurisdiction. [Tr. p. 37.]

The question on this appeal then is simply whether the District Court was justified in finding that it was without jurisdiction of the controversy. It is appellant's contention that, under such circumstances, the District Court

should have allowed plaintiff to dismiss as to all defendants excepting the defendant insurance company on the grounds that said remaining defendants were either improperly joined or were not necessary parties defendant to the controversy, thereby retaining jurisdiction of the action. In the alternative, it is submitted that the District Court should have retained jurisdiction by realigning all defendants other than the defendant insurance company as parties plaintiff, since their interests, if any, were clearly disclosed to lie with plaintiff rather than with the defendant insurance company.

This appeal is both from the order of dismissal and from the denial of plaintiff's subsequent motions above set forth. The questions involved in each are substantially the same.

SPECIFICATION OF ERRORS RELIED UPON.

Point I: The Court erred in finding that it lacked jurisdiction of the action and in ordering a dismissal of the action.

Point II: The Court erred in denying appellant's motion to vacate the order of dismissal.

Point III: The Court erred in refusing to grant plaintiff leave to file an amended complaint.

Point IV: The Court erred in refusing to realign parties defendant as parties plaintiff or, in the alternative, to allow plaintiff to dismiss as to certain defendants.

ARGUMENT.

I.

The Joinder of Improper or Unnecessary Parties Defendant Will Not Defeat the Jurisdiction of the Court as Between Parties Properly Before It.

Carneal v. Banks, 10 Wheat. 181, 6 U. S. (L. ed) 297;

Walden v. Skinner, 101 U. S. 577;

Salem Trust Co. v. Mfgs. Finance Co., 264 U. S. 182;

Bullard v. Cisco, 290 U. S. 179;

Wyoga Gas & Oil Corp. v. Schrack (D. C. Pa. 1939), 29 Fed. Supp. 582;

Holmberg v. Hannaford (D. C. Ohio, 1939), 28 Fed. Supp. 216.

The above cases clearly establish the rule set forth in the heading and hold that mere formal parties will not oust the Court of jurisdiction although they do not have the requisite citizenship, provided the real controversy is between citizens of different states. Hence, if in the present case the real controversy was between plaintiff and the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, then the rules established by the above cases would be applicable to the present case.

II.

All Defendants Except the Defendant Insurance Company Were Unnecessary Parties Defendant and the Real Controversy Is Between Plaintiff and the Defendant Insurance Company Only.

It is to be noted that the policy herein sued upon states that The Franklin Fire Insurance Company of Philadelphia, Pennsylvania,

“ . . . does insure B. R. Morris, dba Rifkin & sons hereinafter called the assured, . . . for his (their) account and for account of customers hereinafter described, . . . ” [Tr. p. 10.]

The policy does not name any customers specifically and by its terms directly insures the plaintiff herein. Later in the policy, it is stated:

“This policy insures: against all risks of loss of or damage to the insured property including the assured’s legal liability therefor” [Tr. p. 11.]

As disclosed by plaintiff’s complaint, plaintiff was seeking recovery for the destruction by fire of the fur garments belonging to customers of plaintiff and left in the possession of plaintiff. As such, plaintiff was a bailee seeking to recover on an insurance policy for destruction of goods in his possession as a bailee. As such, plaintiff was entitled to institute the action in his own name and to be paid any recovery thereunder.

Phoenix Insurance Co. v. Erie & Western Trans. Co., 117 U. S. 312 at 324;

Connecticut Fire Ins. Co. v. Evans (C. C. A. 5th), 53 Fed. (2d) 839;

68 *A. L. R.*, p. 1344 *et seq.* and cases cited therein.

Hence, clearly here plaintiff was the proper party to recover from the defendant insurance company on the said policy of insurance. The joinder of the remaining defendants was merely for the purpose of seeking to determine their rights as against plaintiff to the proceeds of the policy and for the convenience of plaintiff in presenting his proof of loss in the action. However, they were in no sense necessary parties to the action. This clearly appears on the face of the original complaint. [Tr. p. 8.] The real controversy existed between plaintiff and the defendant insurance company. The diversity of citizenship is to be determined between plaintiff and the defendant insurance company. The Court should not have concerned itself with the remaining defendants and should have allowed plaintiff to dismiss them from the action, particularly inasmuch as they had never been served or appeared in the action.

Wyoga Gas & Oil Corp. v. Schrack, supra.

Thus where the legal right to sue is in the plaintiff, the Court will not inquire into the residence of those who may have an equitable interest in the claim since they are not necessary parties on the record.

Bonnafee v. Williams, 3 Howe. 574, 11 U. S. (L. ed.) 732.

Thus the citizenship of a trustee rather than of the beneficiaries is determinative on the question of jurisdiction.

Dodge v. Tulleys, 144 U. S. 451;

Bullard v. Cisco, 290 U. S. 174.

III.

In Any Event the Court Should Have Realigned All Defendants Other Than the Defendant Insurance Company as Parties Plaintiff.

Where a party is joined as a defendant and his real interest lies with the plaintiff it is the duty of the Court to make inquiry into the facts and to realign such defendant as a party plaintiff and to retain jurisdiction of the controversy.

Irwin v. Missouri Valley Bridge & Iron Co., 19 Fed. (2d) 300, certiorari denied 275 U. S. 540, and again denied 275 U. S. 572; *Richardson v. Blue Grass Mining Co.*, D. C. Ky. 1939, 29 Fed. Supp. 658; *Hughes Federal Practice*, section 746; *Hamer v. New York Rys. Co.*, 244 U. S. 266; *City of Indianapolis v. Chase National Bank*, 86 L. Ed. 27 (Oct. 1941).

It should be noted that under Section 19(a) of the new rules of Civil Procedure for the District Courts of the United States, where a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff. It is submitted that, as shown above, said remaining defendants were not necessary parties to the action and, hence, should have been dismissed, disregarded or realigned. However, if said parties were necessary parties, plaintiff should have been allowed to avail himself of the provisions of Rule 19(a) and make involuntary plaintiffs out of said defendants. The facts of the present case would seem to clearly bring it within said rule.

CONCLUSION.

Hence, it is submitted that no matter how considered, the District Court had and should have retained jurisdiction of the controversy in this action, and its dismissal of the same for lack of jurisdiction was error.

Respectfully submitted,

ZUCKERMAN AND STEIN,

ARTHUR EDMUND STEIN,

By ARTHUR EDMUND STEIN,

Attorneys for Appellant.

(11)

No. 10024

92

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

B. R. MORRIS, doing business as L. RIFKIN & SONS,
Appellant,

vs.

THE FRANKLIN FIRE INSURANCE COMPANY OF PHIL-
ADELPHIA, PENNSYLVANIA, a corporation,
Appellee.

APPELLEE'S BRIEF.

JOSEPH F. RANK,
915 Transamerica Building, Los Angeles,
Attorney for Appellee

FILED
MAR 31 1942

PAUL P. O'BRIEN,

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No. 10024

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

B. R. MORRIS, doing business as L. RIFKIN & SONS,
Appellant,

vs.

THE FRANKLIN FIRE INSURANCE COMPANY OF PHIL-
ADELPHIA, PENNSYLVANIA, a corporation,
Appellee.

APPELLEE'S BRIEF.

Jurisdiction.

As stated by appellant, the entire issue involved in this appeal deals with the question of jurisdiction.

The appeal is taken from a judgment of dismissal of the action granted by the District Court and from an order of the District Court denying the motion of the plaintiff to vacate said order of dismissal.

In order for the District Court to have had jurisdiction all of the plaintiffs and all of the defendants must have been residents of different states in order to constitute a diversity of citizenship.

*U. S. Code, Annotated, Title 28, Section 41, Sub-
division 1;*

Wylie v. State Board of Equalization of California
(D. C. Cal., 1938), 21 Fed. Sup. 604;

Osthaus v. Button (C. C. A. Pa., 1934), 70 Fed.
(2d) 392.

Moreover, should it have been feasible to have re-aligned the parties so as to have made all defendants, except Franklin Fire Insurance Company of Philadelphia, Pennsylvania, plaintiffs instead of defendants, each of said plaintiff's claim must have exceeded the jurisdictional amount of \$3000.00.

U. S. Code, Annotated, Title 28, Paragraph 127.

The record indisputably establishes that the defendants, other than the Franklin Fire Insurance Company of Philadelphia, Pennsylvania, had the same citizenship as the plaintiff and hence there was no diversity. Also the record fails to show that were such defendants treated as plaintiffs that the amounts of their respective claims would each have been over the jurisdictional minimum of \$3000.00. The record also shows that the defendants, other than the Franklin Fire Insurance Company of Philadelphia, Pennsylvania, were proper, necessary and indispensable parties and that their respective claims were several and not united or common.

Hence, the District Court lacked jurisdiction.

The jurisdiction of the Circuit Court of Appeals is predicated under U. S. Code Annotated, Title 28, Section 225, A and D. The judgment of dismissal of the District Court was a final judgment.

Statement of the Case.

Appellant's statement of the case as contained in pages 3 to 7 of his opening brief is correct save as qualified by the following corrections and additions

The action was filed as a class action in behalf of the various parties (listed as defendants) except as to the defendant Franklin Fire Insurance Company of Philadelphia, Pennsylvania. Plaintiff elected to bring this action because of the fact that he was bailee of these other defendants. It is not true that the amount in controversy as to the claim of any one individual defendant member of the class referred to was in excess of \$3000.00, although in the complaint it is claimed that the aggregate claims of the various members of the class was in the amount of \$6720.00. The asserted claim of each defendant was separate and distinct from the claims of every other defendant. The claim of each defendant was several and as to a particular amount of money and the claim of each defendant did not go to any entire or undivided interest.

The complaint alleged that it was the intention of the plaintiff and the insurance company to cover customers' fur garments in possession of the plaintiff irrespective of whether or not the plaintiff issued a receipt to such customer specifying a declared valuation, but this allegation is denied in the answer of the defendant. The policy attached to the complaint as Exhibit A specifically provides, "2. This company shall not be liable hereunder

for more than the amount stipulated in the assured's receipts as applied to each respective article whether on account of the assured's legal liability or otherwise." The answer further denied the allegation in the complaint that there was any waiver whatsoever in respect to this condition of the policy.

There are no facts alleged in the complaint showing that the defendant insurance company became liable to the plaintiff for the sum of \$6720.00. There is a conclusion recited in page 12 of the complaint as follows: "That thirty days after receipt of said proof of loss above set forth, to-wit, on the 22nd day of February, 1940, there became due and payable from said defendant Franklin Fire Insurance Company of Philadelphia, Pennsylvania, to said plaintiff *and* said defendant owners the sum of \$6720.00."

The cause herein was set for trial on April 25, 1941, and prior thereto the plaintiff moved for a continuance, which motion was heard on March 31, 1941. By affidavit in support thereof, executed by plaintiff's counsel, among other things it was alleged that plaintiff filed the action thinking that the defendants named would join in the action to set forth their losses; that plaintiff could not serve said defendants as defendants because to do so would create a lack of diversity of citizenship of parties, thereby defeating the jurisdiction of the District Court; that plaintiff believed that defendants named (customers) would ask leave to intervene as plaintiffs if a continuance were allowed. Further in said affidavit it was shown that

plaintiff had not been able to ascertain any loss or liability and it is to be noted that there is nowhere in the complaint any allegation that the plaintiff has sustained any; further in said affidavit filed by the plaintiff in support of said motion for continuance, it is stated that the continuance should be granted until such time as plaintiff's legal liability can be ascertained or until proper parties intervene. In addition said affidavit recites that plaintiff's attorney (who made the affidavit) was engaged in another trial in the District Court that would last for approximately two months. [See Tr. of Rec. pp. 32 to 36.]

The motion for continuance was granted. Thereafter and not until approximately six months later defendant Franklin Fire Insurance Company of Philadelphia, Pennsylvania, moved for the dismissal herein, predicated in part upon the affidavit of plaintiff's attorney filed in support of said motion for continuance above referred to. In the meantime, as is apparent from the record, no amended pleadings, no complaint in intervention or no supplemental pleading of any sort had been offered or leave sought for filing thereof. Even after the filing of the motion to dismiss the action, no notice of motion for leave to file amended pleadings or for intervention or for dismissal as to some defendants was given. Not until at the time of the actual hearing of the motion to dismiss did the plaintiff seek to amend, re-align or dismiss, and even then no affidavits or moving papers were submitted in support thereof. The motion made at the

hearing for leave to file amended complaint was merely oral.

As recited by appellant, the motion to dismiss the action was granted and the oral motion for filing amended complaint denied.

Thereafter on November 3, 1941, pursuant to moving papers theretofore served, motion to vacate the order of dismissal and to allow the filing of an amended complaint, dismiss as to defendants except as to defendant Franklin Fire Insurance Company of Philadelphia, Pennsylvania, or in the alternative to re-align the defendants as parties plaintiff, was made and motion denied. In support of this motion to vacate, an affidavit of plaintiff's attorney was filed in which it was stated among other things that the attorney for plaintiff believed that it was through surprise, mistake and excusable neglect that plaintiff was prevented from furnishing to the court at the time of the hearing of the motion to dismiss, proof that the defendants other than the Franklin Fire Insurance Company of Philadelphia, Pennsylvania, were not necessary parties to the action and should have been dismissed or re-aligned as parties plaintiff. However, nowhere did plaintiff seek to establish any such surprise, mistake or excusable neglect, nor offer any proof that the defendants, other than the Franklin Fire Insurance Company of Philadelphia, Pennsylvania, were not necessary parties to the action. [See Tr. of Rec. p. 47.]

Not only did the record in connection with the motion to dismiss definitely show that the District Court was

without jurisdiction, but in addition the record failed to show that a re-alignment of the parties plaintiff would have availed anything, as jurisdiction would have been defeated unless it was established that each plaintiffs' claim was in the minimum jurisdictional amount. Moreover, the proposed amendment offered at this late stage sought to change the entire claim upon which the complaint was predicated by changing it from a class action or an action in behalf of the parties primarily interested, to-wit, the named defendants, other than the Franklin Fire Insurance Company of Philadelphia, Pennsylvania. A dismissal as to the other defendants would have been to the same effect. Hence, it is the appellee's position and it was the position of the court below, that none of the devices that plaintiff sought to apply to defeat the motion for dismissal or to vacate the order of dismissal would or could be of any avail, and that this was purely and simply an instance of the plaintiff mistaking the forum of his action. Obviously and necessarily, the action should not have been filed in the said United States District Court.

ARGUMENT.

I.

The Customers of the Plaintiff Who Sustained Loss, if Any, Were Necessary and Proper Parties Either as Plaintiffs or Defendants.

Appellee does not take issue with the statement of appellant that for the purpose of determining jurisdiction the court can disregard improper or unnecessary parties. However, it is respectfully submitted that the customers who were named as defendants were necessary parties. In the first place it must be recalled that from plaintiff's very complaint it is established that the action was in the nature of a class action brought by the plaintiff for the benefit of those primarily interested, to-wit, the customers. This is set forth in paragraph X of the complaint. Moreover, in paragraph XI it is set forth that the said customers are those that sustained the loss, which was the subject matter of the action herein. [Rep. Tr. p. 8.] Nowhere in the complaint is there any allegation or statement that the plaintiff, the bailee, sustained any loss. *Nowhere is there any allegation in the complaint that the plaintiff was liable for the loss claimed by the customers.* The only interest that could possibly be claimed by plaintiff under any form of action in which he might join against the defendant Franklin Fire Insurance Company of Philadelphia, Pennsylvania, would have to be predicated upon his "legal liability" for loss or damage to property of his customers. This is the very provision of the policy attached to plaintiff's complaint. [See Tr. of Rec. p. 11.] Hence in the absence of a showing on the part of the plaintiff that he had some sort of legal liability, he could not state a cause of action against the defendant Franklin Fire Insurance Company

of Philadelphia, Pennsylvania. On the other hand, as to the customers, assuming the terms and conditions of the policy had been fulfilled and assuming they suffered loss, then they would have claims under the policy as the policy provided that it covered certain insured property, to-wit, furs or garments trimmed with fur belonging to such customers. Moreover, the policy attached to plaintiff's complaint, and upon which the complaint is predicated, gives an option to the insurance company to pay any loss that might be sustained under the terms of the policy either to the assured or the customer or owner of the property. [See Tr. of Rec. p. 13.] This is an option in favor of the company and any claim that the plaintiff might make in the absence of joinder by the customers would be completely answered by the insurance company electing to exercise their option to adjust with or pay the loss, if any, to the respective customers. Hence it is demonstrated that the customers, the defendants, were not only proper but indispensable parties to the action. It might be added that this is all tacitly admitted by counsel for the plaintiff in the affidavit in support of motion for continuance filed March 26, 1941. (The position is set forth at the bottom of page 33 and page 34 of the transcript of the record herein.)

Indispensable and necessary parties are "persons who not only have an interest in the controversy but an interest of such a nature that a final decree can not be made without either affecting that interest or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."

Niles-Bement Pond Co. v. Iron Molders Union Local No. 68, 254 U. S. 77 at page 80; 65 L. Ed. 145 at page 148, 41 S. Ct. 39.

II.

In Order That the District Court Have Jurisdiction
All of the Plaintiffs and All of the Defendants
Must Be Residents of Different States. There
Must Be a Diversity of Citizenship.

There is no dispute and the plaintiff freely admits that some, if not all of the customers (who were joined as defendants), were residents of the same district in which plaintiff resides. Hence, by the making of these customers defendants, plaintiff created a lack of diversity of citizenship between all of the plaintiffs and all of the defendants and as a result established lack of jurisdiction of the District Court.

U. S. Code, Annotated, Title 28, Section 41, Sub-
division 1;

*Wylie v. State Board of Equalization of Cali-
fornia* (D. C. Cal., 1938), 21 Fed. Sup. 604;

Osthaus v. Button (C. C. A. Pa., 1934), 70 Fed.
(2d) 392.

Johnson vs. Jaskill case,

June 62, Number 9,

Supreme Court Reporter

Volume 110.

III.

Even if There Had Been a Re-alignment So as to Make the Defendants, Other Than the Franklin Fire Insurance Company of Philadelphia, Pennsylvania, Plaintiffs Instead of Defendants, the District Court Would Have Lacked Jurisdiction, as Jurisdictional Amount Would Have Been Lacking.

Had these parties defendant, other than the Franklin Fire Insurance Company of Philadelphia, Pennsylvania, been re-aligned and made plaintiffs then there is no allegation and the plaintiff makes no contention that any one of such individuals had a claim against the defendant Franklin Fire Insurance Company of Philadelphia, Pennsylvania, in excess of the jurisdictional requirement of \$3000.00 This matter was argued and considered by the District Judge both at the time of the motion to dismiss and at the time of motion to vacate the order of dismissal. This being so, and it being apparent that each plaintiff's claim was individual, separate and distinct the fact that the aggregate of the claims would amount to \$6720.00 would aid the plaintiff not one whit.

Pinel v. Pinel, 240 U. S. 594;

Hilliker v. Grand Lodge K. P., et al., 112 Fed. (2d) 382 (Sixth Circuit).

In the said case of *Hilliker v. Grand Lodge K. P., supra*, the court states as follows:

“The only ground of federal jurisdiction alleged is diversity of citizenship. The plaintiff's claim against the bank was \$21.45, reduced by the 20 per

cent in dividends prior to the beginning of her suit. Her only interest is to have the balance to her credit paid and in no circumstances may she received more. *It has long been held that creditors who have each a single title or right against a debtor not in excess of \$3000 may not aggregate their claims, as plaintiffs, to confer jurisdiction upon a Federal Court.* Title Guaranty Co. v. Allen, 240 U. S. 136, 140, 36 S. Ct. 345, 60 L. Ed. 566; Lion Bonding Co. v. Karatz, 262 U. S. 77, 43 S. Ct. 480, 67 L. Ed. 871; Rogers v. Hennepin County, 239 U. S. 621, 36 S. Ct. 217, 60 L. Ed. 469; Scott v. Frazier, 253 U. S. 243, 40 S. Ct. 503, 64 L. Ed. 883. In cases where the amount in controversy is measured by the value of the property involved in the litigation, Hunt v. New York Cotton Exchange, 205 U. S. 322, 335, 27 S. Ct. 529, 51 L. Ed. 821; Western & Atlantic R. R. Co. v. Railroad Commission of Georgia, 261 U. S. 264, 43 S. Ct. 252, 67 L. Ed. 645, or where the several plaintiffs have a common undivided interest in a single title or right, Troy Bank v. G. A. Whitehead & Co., 222 U. S. 39, 41, 32 S. Ct. 9, 56 L. Ed. 81, it may be enough, to confer jurisdiction, that the interests of the plaintiffs collectively equal the jurisdictional amount. *The fact that the appellant alleged that she sued on behalf of others similarly situated, does not help her.* Title Guaranty Co. v. Allen, *supra*; Eberhard v. N. W. Mutual Life Ins. Co., 6 Cir., 241 F. 353, 356; Wales v. Jacobs, 6 Cir., 104 F. 2d 264. *The appellant asserts no common and undivided right in herself jointly with others in any fund or property, and the amount owing to her or to each of the others of the class depends upon each individual contract alone.* No relief is sought for group rights under a single decree, Beatty v. Kurtz, 2 Pet. 566, 7 L. Ed. 521, or rights which no single plaintiff can enforce in the

absence of the others because derived from a single security instrument. *Troy Bank v. Whitehead & Co., supra.* *The contention that the funds sought to be recovered will constitute a trust fund for the benefit of all creditors of the bank, does not permit aggregation.* As pointed out in *Wales v. Jacobs, supra*, the assets of a corporation always constitute a trust fund for the benefit of its creditors, but appellant's claim to an aliquot interest therein is still single. * * * *A general allegation that the amount in controversy exceeds \$3,000 is of no avail where the bill, as here, discloses that it must rest on aggregating individual claims for less.* *Vance v. Vandercook Co., 170 U. S. 468, 18 S. Ct. 645, 42 L. Ed. 1111."* (Italics ours.)

In the case of *Pinel v. Pinel, supra*, the court stated as follows:

"The settled rule is that when two or more plaintiffs having separate and distinct demands unite in a single suit it is essential that the demand of each be of the requisite jurisdictional amount, but when several plaintiffs unite to enforce a single title or right in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount. *Clay v. Field, 138 U. S. 464-479; Troy Bank v. Whitehead, 222 U. S. 39.* This case comes within the former class since the title of each complainant is separate and distinct from that of the other. It being evident that the testator's omission to provide for one of the children by will, * * * is independent of the question whether a like mistake was made with respect to another child."

Conclusion.

It is respectfully submitted that the trial court properly held that it had no jurisdiction and properly dismissed the action herein and refused to vacate its order of dismissal. Not only would an amendment or re-alignment or dismissal as to certain defendants have availed the plaintiff nothing, but the District Court most certainly did not abuse its discretion in refusing to allow the same. The judgment of the District Court should be affirmed.

Respectfully submitted,

JOSEPH F. RANK,

Attorney for Appellee.

United States
Circuit Court of Appeals

For the Ninth Circuit.

CYRUS E. AVERILL, JR.,

Appellant,

vs.

FRANCIS F. QUITTNER, Trustee in Bankruptcy
of the Estate of Cyrus E. Averill and FLOYD
C. BALDING,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the
United States for the Southern District
of California, Central Division.

FILED

APR 2 - 1942

PAUL P. O'BRIEN, JR.
CLERK

United States
Circuit Court of Appeals

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CYRUS E. AVERILL, JR.,

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Upon Appeal from the District Court of the
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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KENNETH E. MATOT, Esq.,

DAVID C. LEVENSON, Esq.,

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Los Angeles, California. [1*]

In the District Court of the United States

For the Southern District of California

Central Division

In Bankruptcy

No. 36534-C

In the Matter of

CYRUS E. AVERILL, JR.,

Bankrupt.

DEBTOR'S PETITION

To the Honorable Judge of the District Court of
the United States for the Southern District of Cali-

*Page numbering appearing at foot of page of original certified
Transcript of Record.

formia: The Petition of Cyrus E. Averill, Jr., residing at No. 3704 Wasatch Street, in the City of Venice, County of Los Angeles, State of California, by occupation an Entertainer, and employed by Paradise Cafe, Inc. (or engaged in the business of), respectfully represents:

1. Your petitioner has had his principal place of business (or has resided, or has had his domicile) at 674 Vermont Street, Los Angeles, California, within the above judicial district, for a longer portion of the six months immediately preceding the filing of this petition than in any other judicial district.

2. Your petitioner owes debts and is willing to surrender all his property for the benefit of his creditors, except such as is exempt by law, and desires to obtain the benefit of the Act of Congress relating to bankruptcy.

3. The schedule hereto annexed, marked Schedule A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and, so far as it is possible to ascertain, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said Act.

4. The schedule hereto annexed, marked Schedule B, and verified by your petitioner's oath, contains an accurate inventory of all his property, real and personal, and such further statements concerning said property as are required by the provisions of said Act.

Wherefore your petitioner prays that he may be adjudged by the court to be a bankrupt within the purview of said Act.

CYRUS E. AVERILL, JR.

Petitioner

PAUL HITCH,

Attorney for Petitioner

State of California,
County of Los Angeles—ss.

I, Cyrus E. Averill, Jr., the petitioner named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

CYRUS E. AVERILL, JR.,

Petitioner.

Subscribed and sworn to before me this 17th day of June, 1940.

DAVID LYNN,

Notary Public in and for said County and State.

(Official character.)

[Endorsed]: Filed June 18, 1940, 9:18 A.M. R. S. Zimmerman, Clerk. [2]

[Title of District Court and Cause.]

SPECIFICATIONS OF OPPOSITION TO
DISCHARGE OF BANKRUPT

Come Now Floyd C. Balding and Francis F. Quittner, as Trustee in Bankruptcy of Cyrus E. Averill, Jr., Bankrupt, and file these specifications of objection to discharge and allege as follows:

That Floyd C. Balding is a creditor of the above named bankrupt, whose claim has been regularly filed and allowed in the above entitled matter; that Francis F. Quittner is the duly elected, qualified and acting Trustee of the above named bankrupt, and duly authorized to oppose the bankrupt's discharge, and your petitioners hereby oppose the granting of a discharge to the said Cyrus E. Averill, Jr., from his debts, and for the grounds of such opposition, file the following specifications, to-wit:

Specification No. 1

That the said Cyrus E. Averill, Jr., has failed to keep books of account and records from which his financial condition and business transactions could be ascertained, in that the said Cyrus E. Averill, Jr., has failed to keep proper ledgers, journals, day books, cash receipt books, bank deposit books or other records from which his receipts and disbursements could be properly ascertained, or ascertained at all, and that by reason of the foregoing the bankrupt has been guilty of one of the omissions specified in Section 14-b of the Bank-

ruptcy Act of the [3] United States, and by reason thereof should be denied his discharge.

Specification No. 2

That such books and records pertaining to his financial condition and business transactions as the bankrupt did keep have been concealed or destroyed by him, and by reason of the foregoing the bankrupt has committed one of the acts specified in Section 14-b, Sub. 2 of the Bankruptcy Act of the United States, and should be denied his discharge.

Specification No. 3

That on or about the 15th day of March, 1939, with the intent to hinder, delay or defraud his creditors and to conceal the assets hereinafter described, therefrom, this bankrupt, Cyrus E. Averill, Jr., caused to be executed and recorded to Glen E. Bodell a certain chattel mortgage by which the said Cyrus E. Averill, Jr., pledged to the said Glen E. Bodell, to secure a certain promissory note of even date, the restaurant fixtures and business then conducted by the bankrupt at 674-76 South Vermont Avenue, in the City of Los Angeles, County of Los Angeles, State of California, known as Bud Averill's Paradise Cafe; that said purported note and chattel mortgage were given by the said bankrupt, Cyrus E. Averill, to the said Glen E. Bodell without any consideration whatsoever and for the sole purpose of concealing his said assets from his said creditors; that thereafter, the said Cyrus E. Aver-

ill, Jr., and Glen E. Bodell, and others, in furtherance of a conspiracy which then existed between them, did form the Paradise Cafe, Inc., a California corporation, and in furtherance of said plan, plot and scheme to defraud his said creditors, and that at all times since the organization of the said corporation, the said corporation has been and now is the alter-ego of the bankrupt, Cyrus E. Averill, Jr.; that thereafter and on or about the 18th day of June, 1940, the said Cyrus E. Averill, the Bankrupt herein, caused the [4] said Paradise Cafe, Inc., a corporation, to file a petition in bankruptcy, and by said means attempted to and did thereby cause the assets of said business to be concealed from and lost to the creditors of said bankrupt. That by reason of the foregoing the bankrupt has been guilty of one of the offenses specified in Section 29-b of the Bankruptcy Act of the United States, and one of the acts specified in Section 14-b of the Bankruptcy Act of the United States, and should be denied his discharge.

Specification No. 4

That on or about the 14th day of December, 1939, the objector, Floyd C. Balding, discovered that on or about the said 15th day of March, 1939, the said bankrupt, Cyrus E. Averill executed a mortgage covering Lots 115 and 116, Tract No. 6052, as recorded in Book 67, pages 71 and 72 of Maps, Records of Los Angeles County, in favor of Glen E. Bodell, to secure a certain promissory note of said

date, payable to the said Glen E. Bodell; that said note and mortgage were made without any consideration whatsoever and was a fraud on creditors and was a continuation of the conspiracy between the said bankrupt, Cyrus E. Averill, Jr., and Glen E. Bodell and others. That thereafter, and on the 24th day of January, 1940, your objector, Floyd C. Balding, filed an action in the Superior Court of the State of California, in and for the County Los Angeles, and entitled Floyd C. Balding versus Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill doing business as Bud Averill's Paradise Cafe; Paradise Cafe, Inc., a corporation, Glen E. Bodell, Bruce Davis and A. Schuer, being Numbered 448466, to set aside Fraudulent Chattel Mortgage and fictitious sale thereunder and to set aside fraudulent trust deed, and instruments hereinbefore referred to; that thereafter, and on or about the 15th day of June, 1940, a judgment was made and entered in the above entitled action by which it was adjudged and decreed by the Court that the said [5] chattel mortgage and mortgage hereinbefore mentioned, were vacated and set aside and declared null and void for any purpose whatsoever. That said acts of said Cyrus E. Averill, Jr., the bankrupt herein, and Glen E. Bodell were a continuing fraud and conspiracy, and within the twelve month period immediately preceding the filing of the petition in bankruptcy herein.

Specification No. 5

That in the course of the proceedings in bankruptcy, the said Bankrupt, Cyrus E. Averill, Jr., constructively refused to obey the order of the Court in this, that he caused the petition in bankruptcy of the fraudulently formed Paradise Cafe, Inc., a corporation, to be filed and thereby caused the property which had been fraudulently transferred to Glen E. Bodell and Paradise Cafe, Inc., a corporation, to be listed as assets of the Paradise Cafe, Inc., a corporation, when as a matter of fact the said assets were assets of said Cyrus E. Averill, Jr., and that said transfer by the said bankrupt, Cyrus E. Averill, Jr., to the said Glen E. Bodell and by the said Glen E. Bodell to the Paradise Cafe, Inc., a corporation, was declared by the order of the Superior Court in case No. 448466 to be fraudulent, which said fact was known to said Cyrus E. Averill, Jr., the bankrupt herein, and that by said conspiracy the Trustee in Bankruptcy in this case was unable to secure all of the assets which in fact was the property of this said bankrupt.

Specification No. 6

That by reason of the fraud and conspiracy by the bankrupt herein, Cyrus E. Averill, Jr., and Glen E. Bodell, as aforesaid, the said bankrupt has concealed from his creditors one-half of his assets in the said Paradise Cafe, Inc., a corporation, in the sum of Eleven Hundred Dollars (\$1100.00), more or less, and by reason thereof the said bank-

rupt estate herein has been defrauded by the said act of said bankrupt in said sum, which [6] was made and done by the said bankrupt for the purpose of paying said sum to the other parties conspiring with the said bankrupt, and in fraud of his creditors in this said proceeding.

Specification No. 7

That said bankrupt, Cyrus E. Averill, Jr., has conspired to conceal his assets in this matter with Glen E. Bodell and others in this, that said bankrupt, Cyrus E. Averill, Jr., transferred to the said Glen E. Bodell the said assets of the business conducted by the said bankrupt under the name of the Bud Averill's Paradise Cafe; that in furtherance of said fraud and conspiracy for the purpose of concealing his assets, the said Cyrus E. Averill, Jr., and Glen E. Bodell did cause the said Paradise Cafe to be organized as a corporation, and thereafter, and in furtherance of said plan, plot and conspiracy to defraud his said creditors, the bankrupt, Cyrus E. Averill, Jr., within a year from the date of the filing of his petition in bankruptcy herein, caused a petition in bankruptcy to be filed by the Paradise Cafe, Inc., a corporation, and did cause the said assets to be listed as the assets of said Paradise Cafe, Inc., a corporation, which was in furtherance of the plan, plot, scheme and conspiracy between said Glen E. Bodell and Cyrus E. Averill, Jr., the bankrupt herein, to conceal the assets of the said bankrupt, Cyrus E. Averill, Jr., which

said plan, plot and conspiracy merged and resulted in the filing of the bankruptcy petition by the Paradise Cafe, Inc., a corporation, all of which said acts are specified in Subdivision 4, Section 14, of the Bankruptcy Act of the United States, known as the Chandler Act.

Wherefore, these objectors, and each of them, pray that the petition of the bankrupt for his discharge in bankruptcy be denied.

FRANCIS F. QUITTNER

FLOYD C. BALDING

Petitioners

KENNETH E. MATOT, DAVID C.

LEVENSON and NAT ROSIN,

By KENNETH E. MATOT

Attorneys for Petitioners. [7]

United States of America

State of California

County of Los Angeles—ss.

Francis F. Quittner and Floyd C. Balding being duly sworn, depose and say: That they are the petitioners in the above entitled matter; that they have read the foregoing Specifications and know the contents thereof; that the same are true of their own knowledge except as to the matters which are therein stated upon information and belief and as to those matters that they believe it to be true.

FRANCIS F. QUITTNER

FLOYD C. BALDING

Subscribed and sworn to before me this 17th day of February, 1941.

[Seal] DAVID C. LEVENSON
Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Filed Feb. 18, 1941, by Referee.
Filed July 15, 1941, R. S. Zimmerman, Clerk. [8]

[Title of District Court and Cause.]

ORDER DENYING BANKRUPT'S
DISCHARGE

Specifications of objection to the discharge of the above named bankrupt having been filed jointly by Floyd C. Balding, a creditor, and Francis F. Quittner, the Trustee in this matter, and said specifications of objection having been duly heard and considered, and the undersigned Referee having filed herein his Memorandum of Decision thereon;

It is ordered that the above named bankrupt, Cyrus E. Averill, Jr., be and he is hereby denied a discharge from his debts in this matter.

Dated: June 9, 1941.

BENNO M. BRINK

Referee in Bankruptcy

[Endorsed]: Filed June 10, 1941. R. S. Zimmerman, Clerk. [9]

[Title of District Court and Cause.]

MEMORANDUM OF DECISION UPON
OBJECTIONS TO DISCHARGE

Specifications of objection to the discharge of the above named bankrupt were filed jointly in this case by Floyd C. Balding, a creditor, and Francis F. Quittner, the Trustee in this matter. The said specifications are seven in number. The first and second charge that the bankrupt failed to keep or that he concealed certain books and records in connection with a cafe business in which he was engaged. The remaining specifications relate to an alleged fraudulent transaction hereinafter referred to in detail. All of the said specifications of objection having been duly heard they are now before me for decision.

I am entirely satisfied that the first and second specifications have not been sustained, but I am also satisfied that the bankrupt's discharge must be denied on account of the aforesaid fraudulent transaction. In that connection we are particularly concerned with the following provisions of the Bankruptcy Act relating to the discharge of a bankrupt:

“Section 14 (c): The Court shall grant the discharge unless satisfied that the bankrupt has * * * (4) at any time subsequent to the first day of the twelve months immediately preceding the filing of the petition in bankruptcy, transferred, removed, destroyed, or concealed, or

permitted to be removed, destroyed, or concealed, any of his property, with intent to hinder, delay, or defraud his creditors; * * * Provided, That if, upon the hearing of an objection to a discharge, the objector shall show to the satisfaction of the court that there are reasonable grounds for believing that the bankrupt [10] has committed any of the acts which, under this subdivision c, would prevent his discharge in bankruptcy, then the burden of proving that he has not committed any of such acts shall be upon the bankrupt."

The bankrupt, as stated, was engaged in the cafe business. On July 21, 1939, Floyd C. Balding, one of the objectors, was awarded a judgment against the bankrupt for approximately \$3,600.00. On July 25, 1939, four days later, there was recorded in the office of the County Recorder of Los Angeles County a chattel mortgage dated March 15, 1939, and covering the fixtures and equipment of the bankrupt's cafe business. The said chattel mortgage was given to one, Glen E. Bodell, to secure a certain promissory note executed by the bankrupt in favor of Bodell under date of March 15, 1939. On said July 25, 1939, there was also recorded a mortgage dated March 15, 1939, and covering the home occupied by the bankrupt and his wife. This mortgage was also given to the said Bodell to secure a note executed in his favor by the bankrupt under date of March 15, 1939. Likewise, on said July 25, 1939,

the said Bodell gave notice of his election to foreclose the said chattel mortgage and a few days later he became the owner of the assets covered thereby at foreclosure sale. Thereupon he transferred the said assets to a corporation known as Paradise Cafe, Inc., which he had caused to be formed, and thereafter the business theretofore conducted by the bankrupt was carried on in the name of the said corporation with the bankrupt acting at all times as manager, except perhaps for a brief period immediately following the transfer of the said assets to the corporation.

On January 24, 1940, Balding, who, as we have seen, had been awarded a judgment against the bankrupt on July 21, 1939, commenced an action in the Superior Court of Los Angeles County to set aside the aforesaid chattel mortgage and also the aforesaid mortgage on the home of the bankrupt. The said action went to [11] trial and on June 5, 1940, the trial judge made his decision in which he held that the two mortgages involved in the action were fraudulent and void as against the said Balding. However, the formal decree of the Court to this effect was not entered until July 2, 1940.

In the meantime, on June 18, 1940, the bankrupt filed his voluntary petition in bankruptcy in this matter and at the same time and through the same attorney, the aforesaid corporation, Paradise Cafe, Inc., also filed its voluntary petition in bankruptcy. The assets of the aforesaid cafe business were listed

in the schedules filed by the said corporation but were not in the first instance shown in the schedules of the bankrupt in this case. However, on June 28, 1940, the bankrupt in this case, with leave of Court, filed amendments to his schedules in which he listed the said assets. The said assets were duly sold in the bankruptcy Court and thereafter a controversy arose between the Trustee in this case and the Trustee in the corporation case over the proceeds of the sale, which controversy was later settled by an equal division of the proceeds in question between the two estates.

The petition and the schedules in the above mentioned corporation case were signed by Averill, the bankrupt in this case, as president of the said corporation. In explanation of this it is said that when the Superior Court held the aforesaid chattel mortgage to be fraudulent and void the aforesaid Bodell caused the corporation to transfer the assets covered by the chattel mortgage back to Averill. If this is true, it has not been explained why the said assets were in the first instance listed in the corporation's schedules and not in Averill's, except that it is claimed that this was done inadvertently.

There is no doubt but that the aforesaid chattel mortgage which was given by Averill to Bodell was a transfer within the [12] meaning of the above quoted provision of Section 14 (c) 4 of the Bankruptcy Act. That such transfer was made with

intent to hinder, delay and defraud Averill's creditors has been established by the aforesaid decision of the Superior Court. In this connection counsel for Averill argues that the Superior Court merely decreed that the chattel mortgage was fraudulent as to Balding, the plaintiff in the Superior Court action and that it is still an open question as to whether the chattel mortgage was fraudulent as to any other creditors. This, as I see it, is immaterial. A transfer made to hinder, delay and defraud even one creditor is, in my opinion, a bar to discharge under Section 14 (c) 4 of the Bankruptcy Act.

Since the chattel mortgage has been established as a fraudulent transfer the only questions for us to determine are these:

1. Was the said fraudulent transfer made within twelve months immediately preceding the filing of the petition in bankruptcy in this case?
2. Was the said fraudulent transfer a mere scheme or device on the part of the bankrupt in this case to conceal the assets of his cafe business with intent to hinder, delay and defraud his creditors and if so, were such assets so concealed at any time within twelve months immediately preceding the filing of the petition in bankruptcy in this case?

Under the above quoted provision of Section 14 (c) of the Bankruptcy Act, the burden is squarely on the bankrupt in this case to prove that the said

transfer was not made within twelve months before his bankruptcy and that the said transfer was not in fact a concealment of his assets within the same period with the intent to hinder, delay and defraud his creditors. I say the burden is on the bankrupt for the reason that the objectors in this case have shown to the satisfaction of the Court that there are reasonable grounds for believing either that the aforesaid transfer was made within twelve months before the commencement of this case, or [13] that the said transfer was in fact a concealment of the bankrupt's assets within twelve months before bankruptcy with intent to hinder, delay and defraud his creditors.

My conclusion in the matter is that the bankrupt has not met the burden imposed upon him as aforesaid. I am entirely convinced that one of two things happened, namely: (1) that the chattel mortgage here involved was not delivered by the bankrupt to Bodell until July 25, 1939, the day it was recorded, or (2) that if it was previously delivered it was definitely agreed and understood between Averill and Bodell that it was not to be effective for any purpose or recorded or used unless or until the aforesaid Balding recovered a judgment against Averill .

The date of the recording, July 25, 1939, is within the twelve months' period here in question. True, the chattel mortgage and the note secured thereby were both dated March 15, 1939, which is beyond the twelve months' period. Likewise, the chattel

mortgage was acknowledged before a Notary Public on the same day, March 15, 1939. But notwithstanding all of this, I am not satisfied that the instruments here in question were actually signed on the date they bear, to-wit, March 15, 1939.

In any event, however, it is not the date of the execution of an instrument which matters. It is the effective date of the delivery of such instrument which controls in a situation such as we have here in this case. In view of all of the facts and the circumstances of the case I am fully convinced, as I have said, that the chattel mortgage was not delivered before the commencement of the twelve months' period here involved, or if it was so delivered, that it was agreed that the delivery should not be effective for any purpose unless Balding recovered a judgment which he did not do until July 21, 1939, which, as we have seen, was within the period with which we are here concerned. [14]

If the chattel mortgage had actually been delivered, although not recorded, before the commencement of the twelve months' period specified in Section 14 (c) 4 of the Bankruptcy Act, and if, at the time of the delivery, or at any time thereafter, the bankrupt had no fraudulent agreement or understanding with the mortgagee with respect to the recording or the foreclosure of the mortgage, or the disposition of the assets covered thereby, and if the bankrupt did not fraudulently aid or assist in the foreclosure of the mortgage, I would be inclined to hold that the mortgage, although fraudulent in

its inception, would not be a bar to the bankrupt's discharge under Section 14 (c) 4. However, on this point I am completely satisfied that the chattel mortgage in this case was merely a scheme and device whereby the bankrupt endeavored to and succeeded in placing the assets of his cafe business beyond the reach of the aforesaid Balding while he, the bankrupt, continued to retain at least some beneficial interest in said assets or continued to derive some benefit therefrom. In other words, by the chattel mortgage and by its foreclosure by Bodell the bankrupt, with the aid and assistance of Bodell, endeavored to and actually succeeded in concealing the said assets from Balding. Such concealment continued from the time of the delivery of the chattel mortgage down to the commencement of this bankruptcy proceeding and that of the aforesaid corporation. The concealment having continued within the twelve months' period before bankruptcy, is a bar to the bankrupt's discharge, even if the chattel mortgage itself was actually delivered more than twelve months before bankruptcy. The doctrine of continuing concealment, as it affects a bankrupt's discharge, is too well known to require any citation of authority. Even if the act of concealment took place before the commencement of the twelve months' period specified in Section 14 (c) 4 of the Bankruptcy Act, if the thing concealed continued to be concealed [15] until some time within the said twelve months' period, it is a bar to discharge.

However, I cannot agree with counsel for the objectors that there was here a concealment under Section 29 (b) 1 of the Bankruptcy Act by reason of the manner in which the assets here involved were listed in the schedules in this and in the corporation case. A concealment under Section 29 (b) 1 must be committed "knowingly and fraudulently." I cannot conceive that the bankrupt "fraudulently" listed the assets here in question in the first instance in the corporation's schedules and not in his own. By so doing the bankrupt acquired no benefit or advantage of any kind whatsoever. On the contrary, it would have been to his advantage to have listed the assets in his own schedules instead of in the corporation schedules for then his personal creditors would have received the benefit therefrom and if his discharge was denied he would have the benefit of the dividends paid to his creditors out of the assets.

For the reasons here given an order will be entered forthwith denying the bankrupt's discharge in this matter.

Dated: June 9, 1941.

BENNO M. BRINK

Referee in Bankruptcy

[Endorsed]: Filed July 15, 1941. R. S. Zimmerman, Clerk. [16]

[Title of District Court and Cause.]

PETITION AND REQUEST FOR EXTENSION
OF TIME TO FILE PETITION FOR RE-
VIEW.

Paul Hitch, being first duly sworn, deposes and says:

That he is the Attorney of Record in the above entitled matter for Cyrus E. Averill, Jr.; that since the Decision and Memorandum of Decision upon Objections to Discharge of Cyrus E. Averill, Jr., bankrupt has been served upon your affiant, bearing date of June 9, 1941, that affiant has not had the opportunity to thoroughly check the law in the matter.

Further, your affiant says that he has been unable to ascertain from Cyrus E. Averill, Jr., whether or not he intends to retain the present *consul* as his attorney in this matter.

Wherefore, your affiant respectfully requests that this Honorable Court grant an extension of two weeks in which Cyrus E. Averill, Jr., may petition the Court for a review of the above entitled matter.

Further, your affiant sayeth not.

PAUL HITCH

Attorney of Record

Time is hereby extended to and including the 3rd day of July, 1941, for Cyrus E. Averill, Jr. to file petition for a review in the above entitled matter.

June 19, 1941.

BENNO M. BRINK,

Referee in Bankruptcy [17]

State of California,
County of Los Angeles—ss.

Paul Hitch, being by me first duly sworn, deposes and says: that he is the Attorney of Record for Cyrus E. Averill, Jr., and petitioner herein, in the above entitled action; that he has read the foregoing Petition for Extension of Time and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

PAUL HITCH

Subscribed and sworn to before me this 19th day of June, 1941.

[Seal] T. E. WEATHERHOLT

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed June 19, 1941, by Referee.
Filed July 15, 1941, R. S. Zimmerman, Clerk. [18]

[Title of District Court and Cause.]

PETITION OF CYRUS E. AVERILL, JR., FOR
REVIEW OF REFEREE'S ORDER DENY-
ING DISCHARGE.

To the Honorable Paul J. McCormick, Judge of the
Above Entitled Court:

Comes Now your petitioner, Cyrus E. Averill, Jr. and respectfully represents as follows:

I.

That petitioner is the bankrupt in the within proceedings and does allege that heretofore a hearing was held upon the Specifications of Objections to the Discharge of your petitioner, which Specification was filed jointly by Floyd C. Balding, a creditor, and Francis F. Quittner, the trustee in the within proceeding.

II.

That a hearing was duly held upon the Specifications of Objection, and after the same was duly heard before Honorable Benno M. Brink, as Referee, the said Referee did, on the 9th day of June, 1941, enter an order denying the discharge of your petitioner.

III.

That your petitioner did obtain an order extending the time within which to file the within petition for review, and the same has been filed within said period of time. [19]

IV.

That petitioner does and did duly except to said Order, and further alleges that said Order is erroneous, among other reasons, because of the following errors:

1. That the said Order denying discharge is against the law applicable to the facts introduced at the time of the hearing;

2. That said Order is contrary to the facts introduced at the time of the hearing;

3. That the said Order was predicated upon a finding that there was a fraudulent transaction, and no facts were introduced at the time of the hearing of the said Objections to the discharge which could have, in any manner, justified a finding of fraud;

4. That no facts were introduced which could have sustained an Order denying the discharge as to any acts by your petitioner within the twelve months immediately preceding the filing of the petition in bankruptcy;

5. That no facts were introduced that could have justified the Order denying the discharge upon the basis that there was any fraudulent transfer within the twelve months immediately preceding the filing of the petition in bankruptcy, with intent to hinder, delay or defraud the creditors of your petitioner;

6. That neither the evidence introduced at the time of the hearing upon the Objections to the discharge nor the law applicable thereto could sustain an Order denying the discharge of your petitioner.

Wherefore, petitioner prays that the Order of the Referee denying the discharge be reviewed, and that the said Order and the whole thereof be reversed, and an Order made and entered granting to your petitioner his discharge in bankruptcy.

Dated: this 3 day of July, 1941.

CYRUS E. AVERILL, JR.

Bankrupt and Petitioner.

MARTIN GENDEL

Attorney for Petitioner.

(Verified)

[Endorsed]: Filed July 3, 1941, by Referee. Filed July 15, 1941. R. S. Zimmerman, Clerk. [20]

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON PETITION
FOR REVIEW FROM ORDER DENYING
DISCHARGE.

To the Honorable Paul J. McCormick, Judge of
the Above Entitled Court:

I, Benno M. Brink, one of the Referees in Bankruptcy, of this court, before whom the above entitled matter is pending, do hereby certify to the following:

Cyrus E. Averill, Jr., the above named bankrupt, has duly filed his petition for review from an order made by your Referee in this matter denying the said bankrupt's discharge.

The Proceedings

On February 18, 1941, specifications of objection to discharge of the said bankrupt were filed jointly by Floyd C. Balding, a creditor, and Francis F. Quittner, the Trustee in this matter. The said speci-

fications were seven in number. The first and second charged that the bankrupt failed to keep or that he concealed certain books and records in connection with a cafe business in which he was engaged. The remaining specifications related to an alleged fraudulent transaction which is discussed in detail in your Referee's memorandum of decision hereinafter mentioned.

The said specifications of objection came on regularly for hearing before your Referee, the objectors appearing by their attorneys, Messrs. Kenneth E. Matot, David C. Levenson and Nat Rosin, and the bankrupt appearing by his attorney, Paul Hitch, [21] Esq., (Martin Gendel, Esq., has since been substituted as attorney for the bankrupt in this matter in the place and stead of the said Paul Hitch.) After the aforesaid hearing was concluded your Referee filed his aforesaid memorandum of decision in which he overruled the objectors' first and second specifications and in which he directed that the bankrupt's discharge be denied on account of the aforesaid fraudulent transaction. Thereafter, on June 9, 1941, a formal order was made denying the bankrupt's discharge and it is from this order that this review is taken.

The Questions Presented

The question presented by this review is this:

Does the evidence sustain your Referee's findings and his conclusions that the bankrupt should be denied his discharge on account of the aforesaid fraudulent transaction?

The Evidence and the Findings and Conclusions of
the Referee

The petitioner on review has not supplied your Referee with a transcript of the evidence but a summary of the evidence and your Referee's findings and conclusions are all set forth in his aforesaid memorandum of decision which is going up with this certificate.

The Order of the Referee

A certified copy of your Referee's order in this matter may be found in the Clerk's file in this case.

Papers Submitted

I hand up for the information of the Court the following papers:

1. Specifications of objection to discharge of bankrupt.
2. Trustee's brief in re objections to discharge of the bankrupt.
3. Bankrupt's brief in re objections to discharge.
4. Reply brief of Trustee and claimant, Floyd C. Balding [22]
5. Memorandum of decision upon objections to discharge.
6. Petition and request for extension of time to file petition for review, and order thereon.
7. Petition of Cyrus E. Averill, Jr., for review of Referee's order denying discharge.

Dated: July 14, 1941.

BENNO M. BRINK

Referee in Bankruptcy.

[Endorsed]: Filed July 15, 1941. [23]

[Title of District Court and Cause.]

DECISION ON REVIEW OF REFEREE'S
ORDER DENYING DISCHARGE TO
BANKRUPT.

Upon consideration of the entire record, including the reporter's transcripts of testimony and proceedings before the referee, no error is shown in the order of the referee denying a discharge to the bankrupt. Accordingly, the referee's memorandum of decision, the findings of fact, conclusions of law, and the order denying bankrupt a discharge dated June 9, 1941, are and each is confirmed, and each specifically made the action and decision of this court. Exceptions allowed bankrupt.

Section 67d(2), Bankruptcy Act,

Section 67d(5), Bankruptcy Act,

Section 2957, California Civil Code,

Swift v. Higgins, (C.C.A. 9), 72 F.(2d) 791,

In re McKane, 19 A.B.R. 103.

Dated November 1, 1941.

PAUL J. McCORMICK

United States District Judge.

[Endorsed]: Filed Nov. 1, 1941. [24]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given, that Cyrus E. Averill, Jr. hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, said appeal being from the order of the Referee denying the discharge to the bankrupt, which order is dated June 9, 1941, and the order of the Honorable Paul J. McCormick, United States District Judge confirming the order of Referee Benno M. Brink denying the bankrupt's discharge, said order of the District Court being dated November 1, 1941.

Dated: This 26 day of November, 1941.

MARTIN GENDEL

Attorney for Appellant.

[Endorsed]: Filed Nov. 26, 1941. R. S. Zimmerman, Clerk. [25]

[Title of District Court and Cause.]

DIRECTIONS TO CLERK OF DISTRICT COURT FOR NOTIFICATION OF FILING NOTICE OF APPEAL AND MAILING COPIES THEREOF TO ALL PARTIES TO THE JUDGMENT OTHER THAN THE PARTY TAKING THE APPEAL.

To R. S. Zimmerman, Clerk.

Pursuant to the provisions of Rule 73-B of new Rules of Civil Procedure, you are hereby directed to give notice by mail of the filing of appeal, to the following parties to the judgment, other than

to the party taking the appeal or to his counsel of record, as follows:

Francis F. Quittner, Trustee

His Counsel: Nat Rosin

111 West 7th Street

Los Angeles, California

Floyd C. Balding

His Counsel: Kenneth E. Matot &

David C. Levenson

542 South Broadway

Los Angeles, California

Dated: this 26 day of November, 1941.

MARTIN GENDEL

Attorney for Appellant.

[Endorsed]: Filed Nov. 26, 1941. R. S. Zimmerman, Clerk.

Mailed copies 11/26/41. E. L. S. [26]

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED
UPON ON APPEAL BY APPELLANT

I.

The District Court erred in rendering the order affirming the Referee's denial of discharge of the bankrupt.

II.

The order of the Referee and the order of the District Judge confirming the same are against the

law applicable to the facts introduced at the time of the hearing of the specifications of objection to the discharge.

III.

That the order of the Referee and the order of the District judge confirming the same are contrary to the facts introduced at the time of the hearing upon the specifications of objection to the discharge.

IV.

That the District Court erred in confirming the order of the Referee predicated upon a finding that there was a fraudulent transaction where no facts were introduced at the time of the hearing upon discharge which could in any manner justify the finding of fraud.

V.

That the District Court erred in sustaining the ruling of the Referee in that no facts were introduced which could have sustained a finding that your appellant had committed any acts of bankruptcy within the twelve months immediately preceding [27] the filing of petition in bankruptcy, which would have justified the denial of the discharge of bankrupt.

VI.

That the District Court erred in sustaining the finding of the Referee that there were any acts which constituted a fraudulent transfer or which constituted a transfer with intent to hinder, delay

or defraud the creditors of appellant, and that any of said acts incurred within four months or within twelve months prior to bankruptcy.

VII.

That both the District Court and the Referee in Bankruptcy erred in considering evidence which was introduced on hearings other than the hearing on specifications of objections to the discharge, and appellant particularly points out that the order of the District Judge confirming the Referee specifically refers to "transcripts" and that in actuality, only one transcript was submitted which contained the evidence introduced at the time of hearing of objection to the discharge.

VIII.

That the order of the District Court confirming the Referee was in error, since no one of the specifications of objection to the discharge or any part thereof contained facts sufficient to state a valid objection, under the Bankruptcy Act, to the discharge of your appellant.

IX.

That the District Court, in confirming the order of the Referee, erred in that neither the evidence introduced at the time of the hearing, nor the law applicable thereto, could sustain an order denying the discharge of your appellant.

Dated: this 26th day of November, 1941.

MARTIN GENDEL

Attorney for Appellant.

[Endorsed]: Filed Nov. 26, 1941, R. S. Zimmerman, Clerk. [28]

[Title of District Court and Cause.]

STIPULATION RE CONTENTS OF DESIGNA-
TION OF RECORD: ORDER RE STIPU-
LATION

The appellant herein, through his counsel, and the appellee herein, through their counsel, do hereby stipulate that with reference to the exhibits covered by #8 of the stipulated designations of contents of the record on appeal, as follows:

1. The attached (a) complaint, (b) Findings of Fact and Conclusions of Law, and (c) Judgment, are correct copies of the exhibits desired by the appellant and appellees and referred to in the Recorder's Transcript designated as Item #7 of the stipulated designation, and more particularly being those portions of the file in action No. 448466 in the Superior Court of the State of California, in and for the County of Los Angeles, entitled Balding vs. Averill, et al.

2. It is further stipulated that upon certification by the Clerk of the District Court said exhibits consisting of copies of complaint, findings of fact

and conclusions of law and judgment shall be and become a part of the record in the within appeal.

3. It is further stipulated that the Referee's Certificate on Appeal for Review and Order denying discharge in the matter of Cyrus E. Averill, Jr., Bankrupt, In the District Court of the United States, Southern District of California, Central Division, In Bankruptcy No. 36534-C, shall be also con [35] tained in the record on appeal.

Dated this 16th day of January, 1942.

MARTIN GENDEL,

Attorney for Appellant.

NAT ROSIN, KENNETH E. MATOT

and DAVID C. LEVENSON,

By NAT ROSIN,

Attorneys for Appellees.

The within stipulation is hereby approved and it is so ordered:

Jan. 20, 1942.

PAUL J. McCORMICK,

Judge of the District Court.

[Endorsed]: Filed Jan. 20, 1942. [36]

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 448466

FLOYD C. BALDING,

Plaintiff,

vs.

CYRUS E. AVERILL, JR., also known as C. ED-
WARD AVERILL, JR., also known as BUD
AVERILL, doing business as BUD AVER-
ILL'S PARADISE CAFE; PARADISE
CAFE, INC., a corporation, GLEN E. BO-
DELL, BRUCE DAVIS, A. SCHUER, ONE
DOE, TWO DOE and THREE DOE,

Defendants.

COMPLAINT TO SET ASIDE FRAUDULENT
CHATTEL MORTGAGE AND FICTITIOUS
SALE THEREUNDER, AND TO SET
ASIDE FRAUDULENT TRUST DEED

Plaintiff complains of the defendants, and each
of them, and for cause of action, alleges:

I.

That the defendants are residents of the County
of Los Angeles, State of California; that the de-
fendant, Paradise Cafe, Inc., is a corporation or-
ganized and existing under and by virtue of the
laws of the State of California, with its place of
business in the City and County of Los Angeles,
State of California.

II.

That the plaintiff is unaware of the true names or capacities, whether individual, associate, corporate, or otherwise, of the defendants, One Doe, Two Doe and Three Doe, and [37] therefore, sues said defendants, and each of them, by such fictitious names, and will ask leave of the Court to insert their true names and capacities, when same are ascertained, by appropriate amendments.

III.

That on the 15th day of September, 1938, an action was filed in the Superior Court of the State of California, in and for the County of Los Angeles, being action No. 432080, entitled Floyd C. Balding, plaintiff vs. Bud Averill doing business as Bud Averill's Paradise Cafe, Fred Anderson and Charles Tobin; that on the 21st day of July, 1939, a judgment was recovered in said action in favor of the plaintiff, Floyd Balding and against said defendants, for a total sum of Thirty-three Hundred two and 20/100 Dollars (\$3302.20) and costs in the sum of Twenty-four and 90/100 Dollars (\$24.90); that thereafter, and on the 11th day of August, 1939, the Findings of Fact and Conclusions of Law and Judgment in said action were signed and filed in the office of the County Clerk of the County of Los Angeles, and that thereafter, and on or about the 16th day of August, 1939, said judgment was duly entered and docketed by the Clerk of said Court; that on or about the 9th day of October, 1939, an

execution was issued in said action as against any property, real or personal of the defendants named, and that said Execution was duly returned to the Clerk of the Superior Court by the Sheriff of Los Angeles County on the 24th day of October, 1939, wholly unsatisfied.

IV.

That prior to and at the time of the commencement of the action referred to in Paragraph III of this complaint, and after the indebtedness upon which said judgment was obtained had accrued, the defendant, Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill, doing business as Bud [38] Averill's Paradise Cafe, was the owner of and engaged in the cafe and saloon business, known as Bud Averill's Paradise Cafe, located at 674-76 South Vermont Avenue, in the City of Los Angeles, County of Los Angeles, State of California.

V.

That during the pendency of said action as alleged in Paragraph III of this action, and on or about the 15th day of March, 1939, the defendant, Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill, doing business as Bud Averill's Paradise Cafe, did make, execute and deliver to the defendant, Glen E. Bodell, a certain chattel mortgage covering all the fixtures and furnishings and equipment on the business of said defendant at 674-76 South Vermont Avenue,

Los Angeles, California, known as Bud Averill's Paradise Cafe; that at said time and place, so plaintiff is informed and believes, and upon such information and belief alleges that the defendant, Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill, doing business as Bud Averill's Paradise Cafe, did make, deliver and execute to said Glen E. Bodell, a purported document under and by the terms of which the said defendant purported to convey in trust the title to that certain real property then owned by the said defendant, and more particularly described as follows, to-wit:

Lots 115 and 116, Tract 6052, as recorded in Book 67, pages 71 and 72 of Maps, Records of Los Angeles County

as security for a purported debt of the said defendant, Cyrus E. Averill, Jr., to the defendant, Glen E. Bodell; that prior to the making of said encumbrance, said real property was free and clear of any and all encumbrances.

VI.

That thereafter, and pursuant to a notice posted under [39] and by virtue of the terms of the chattel mortgage above referred to, the purported mortgagee purported to elect to take possession of said property so chatteled, and purported to sell the same at public auction; that thereafter, and on or about the 31st day of July, 1939, the said property was purported to have been sold and bought in

by the defendant, Glen E. Bodell, and/or the defendant, Paradise Cafe, Inc.

VII.

That this plaintiff alleges that said incumbrances covering the personal and real property of the defendant, Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill doing business as Bud Averill's Paradise Cafe, as aforesaid, was duly made and given without any consideration whatsoever, and for the sole purpose of hindering, delaying and defrauding this plaintiff.

VIII.

That thereafter and on or about the 9th day of August, 1939, and between the time that said Judgment was duly rendered and prior to the date of its being entered and docketed, the defendants, Glen E. Bodell, Bruce Davis and A. Schuer did incorporate said Paradise Cafe, in the State of California, and that said cafe is now known as the Paradise Cafe, Inc.

IX.

That pursuant to said sale referred to in Paragraph VI of this complaint, the said Glen E. Bodell took possession of the Paradise Cafe, and did, as plaintiff is informed and believes, and upon such information and belief alleges, turn over the assets so foreclosed to the Paradise Cafe, Inc.

X.

That the defendant, Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud

Averill doing business as Bud Averill's Paradise Cafe, has been examined on [40] *on* Supplementry Proceeding pursuant to Section 714-715 of the Code of Civil Procedure of the State of California, and such examination has failed to disclose any assets out of which this judgment can be satisfied, other than the property above referred to, and as a result thereof this plaintiff is without any plain, speedy or adequate remedy at law.

XI.

That by reason of the above facts this plaintiff has been damaged in the sum of Thirty-three Hundred Twenty-seven and 10/100 Dollars (\$3327.10), together with interest thereon at the rate of 7% per anum from the 16th day of August, 1939.

And for a further, separate and second cause of action against the defendants, and each of them, plaintiff alleges:

I.

Sets out Paragraphs, I, II, III, IV, V, VI, VII, VIII, IX, X and XI of the first cause of action and makes them a part of this his second cause of action, as though fully set forth herein.

II.

That the defendants, and each of them, did conspire to hinder, delay and defraud the plaintiff herein, and the plaintiff is informed and believes, and upon such information and belief alleges that said conspiracy to hinder, delay and defraud the

plaintiff herein was done between the 15th day of March, 1939, and the 9th day of August, 1939, by concealing the assets of the said defendant, Cyrus E. Averill, Jr., also known as C. Edward Averill, also known as Bud Averill doing business as Bud Averill's Paradise Cafe.

III.

That the plaintiff is informed and believes, and upon such information and belief alleges that said Glen E. Bodell, [41] Bruce Davis and A. Schuer did know that the action referred to in Paragraph III of the first cause of action, and made a part hereof by reference, was pending, and did know of the subsequent judgment, and plaintiff is informed and believes, and upon such information and belief alleges that said Glen E. Bodell, Bruce Davis and A. Schuer did conspire with said Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill doing business as Bud Averill's Paradise Cafe, to conceal the assets belonging to said defendant, with full knowledge that the action hereinbefore referred to was pending.

IV.

That plaintiff is informed and believes, and upon such information and belief alleges the fact to be that during all the times mentioned in this complaint, the defendant, Glen E. Bodell was insolvent, a fact the defendants well knew.

V.

That plaintiff is informed and believes, and alleges the fact to be that the defendant, Paradise Cafe, Inc., a corporation, is and was during all the times herein mentioned, a one-man corporation controlled by the defendant, Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill doing business as Bud Averill's Paradise Cafe, and who owns and/or controls substantially all of the stock of said corporation, and that said corporation was in fact incorporated by said defendants, Glen E. Bodell, Bruce Davis and A. Schuer, representing the defendant, Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill doing business as Bud Averill's Paradise Cafe, as a cloak to hide and conceal the interests of said defendant in the transaction herein referred, all of which said facts the defendants well knew. [42]

VI.

That between the 15th day of March, 1931, and the 9th day of August, 1939, said Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill doing business as Bud Averill's Paradise Cafe, and Glen E. Bodell did associated themselves for the purpose of concealing the assets of said Cyrus E. Averill, Jr., as hereinbefore mentioned, for the purpose of defrauding and wronging this plaintiff, and did on the 15th day of March, 1939, execute the chattel mortgage herein-

before referred to and did at the same time likewise encumber his real property as hereinbefore alleged, for the purpose of conspiring to conceal the assets of the defendant, Cyrus E. Averill, also known as C. Edward Averill, Jr., also known as Bud Averill, doing business as Bud Averill's Paradise Cafe, and did so create said corporation on or about the 9th day of August, 1939, for the purpose of defrauding plaintiff's recovery of the amount of the judgment by sale of the said assets of said Paradise Cafe, and that the said defendant, Glen E. Bodell, without any consideration and to avoid the payment of the judgment herein referred to, did attempt to and intend to perfect an arrangement, combination and collusion between themselves whereby they might carry on said business, which plan, scheme and conspiracy between themselves was to carry on said business of the Paradise Cafe in the name of the corporation, to prevent the collection of the judgment procured by the plaintiff herein.

VII.

That said defendants in furtherance of said collusion and conspiracy, allowed the defendant, Cyrus E. Averill, Jr. also known as C. Edward Averill, Jr., also known as Bud Averill doing business as Bud Averill's Paradise Cafe, to assume and act as manager of said enterprise, which was called and known as the [43] Paradise Cafe, Inc., and allowed him to enter into possession of said property and to employ laborers, buy materials, contract indebted-

nesses, and sign drafts on the bank account of said Paradise Cafe, Inc., and was further authorized by said defendants to use the said bank as reference as to his relation with said enterprise.

VIII.

That the plaintiff is informed and believes and upon such information and belief alleges that the defendants, and each of them, have threatened to and will either dispose of or further encumber said property and every part thereof in a further attempt to conceal assets and to hinder and delay the plaintiff in collecting the said judgment, and by reason thereof the plaintiff has no plain, speedy or adequate remedy at law, or any other remedy at law, and that the said defendants, and each of them, will dispose of said property as aforesaid unless a Receiver to take charge of said property is appointed or an injunction is granted restraining the defendants, and each of them, from disposing of or in any way or manner incumbering said premises and personal property herein described, or any part thereof.

Wherefore, plaintiff prays judgment against the defendants, and each of them, as follows:

1. For damages in the sum of Thirty-three Hundred Twenty-seven and 10/100 Dollars (\$3327.10) together with interest thereon at the rate of 7% per annum from August 16th, 1939;

2. That the defendants be adjudged to apply to the payment of said judgment and interest thereon,

together with the costs of this action, said property, debts, choses in action and equitable interest belonging to Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill doing business as Bud Averill's Paradise Cafe, or held in trust for him; or in which he is in anyway or manner beneficially interested; [44]

3. That the defendants be enjoined from selling, transferring or interfering with said property and equitable interest therein; -

4. That the defendants, and each of them, be prohibited from making an assignment or confessing any judgment, to enable other creditors or persons to obtain a preference over this plaintiff, or to take any portion of the defendants' property;

5. That a Receiver be appointed of all said property described in this complaint, and that said defendants be directed to execute to plaintiff an assignment thereof, and that said Receiver sell or otherwise dispose of the same and convert the same into money as soon as may be, and apply so much of the proceeds thereof as may be necessary for that purpose to the payment of the plaintiff's judgment herein referred to;

6. That the Court adjudge and determine defendants' interest in the real estate and personal property as set forth in this complaint;

7. That the Court adjudge and determine the purported conveyance of the said business of Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill, doing business as Bud Averill's Paradise Cafe, to the defendant, Glen

E. Bodell and Paradise Cafe, Inc., of his interest in the said business and property, to be fraudulent and of no effect and force whatsoever;

8. That the Court adjudge and determine that the defendant, Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill doing business as Bud Averill's Paradise Cafe, has been and now is the owner and entitled to the immediate possession of the personal and real property described herein;

9. That the Court adjudge and determine that Glen [45] E. Bodell, Paradise Cafe, Inc., Bruce Davis and A. Schuer have no interest whatsoever in and to the real and personal property described in this complaint;

10. That the sale under chattel mortgage be vacated and set aside and be declared null and void, and that said chattel mortgage be delivered to the Court for cancellation by the Court;

11. That the Deed of Trust conveying the property herein described be vacated and set aside and declared null and void;

12. For costs of suit, and for such other and further relief as to the Court may seem meet and just in the premises.

DAVID C. LEVENSON

Attorney for Plaintiff [46]

State of California,
County of Los Angeles—ss.

Floyd C. Balding being by me first duly sworn, deposes and says: that he is the plaintiff in the above entitled action; that he has read the foregoing complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

FLOYD C. BALDING

Subscribed and sworn to before me this 19 day of January, 1940.

DAVID C. LEVENSON

Notary Public in and for the County of Los Angeles, State of California. [47]

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 448466

FLOYD C. BALDING,

Plaintiff,

vs.

CYRUS E. AVERILL, JR., et al.,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF
LAW.

The above-entitled cause came on regularly for trial on June 3, 1940, and was actually tried on

June 4, 1940, and continued on trial on June 5, 1940, in Department 12 of the above-entitled Court, sitting without a jury, a jury having been especially waived, Hon. William J. Palmer, Judge Presiding; David C. Levenson, Esq., appearing for the plaintiff and Messrs. Paul Hitch and Charles W. Rollinson, appearing for the defendants; and evidence both oral and documentary having been introduced, and the case argued and submitted for decision, the Court now makes its findings of fact as follows:

FINDINGS OF FACT

I.

That it is true that the defendant, Paradise Cafe, Inc., is a corporation organized and existing under and by virtue of the laws of the State of California, with its place [48] of business in the City and County of Los Angeles, State of California, and that said corporation was organized on or about the 9th day of August, 1939.

II.

That it is true that on the 15th day of September, 1938, an action was filed in the Superior Court of the State of California, in and for the County of Los Angeles, being action No. 432080, entitled Floyd C. Balding, Plaintiff, versus Bud Averill, doing business as Bud Averill's Paradise Cafe, Fred Anderson and Charles Tobin; that on the 21st day of July, 1939 a judgment was recovered in said action in favor of the plaintiff Floyd C. Balding and

against the defendants, for a total sum of Thirty-Three Hundred Two and 20/100 dollars (\$3302.20), and costs in the sum of Twenty-four and 90/100 dollars (\$24.90); that thereafter, and on the 11th day of August, 1939, the findings of fact and conclusions of law and judgment in said action were signed and filed in the office of the County Clerk of the County of Los Angeles, and that thereafter, and on or about the 16th day of August, 1939, said judgment was duly entered and docketed by the Clerk of said Court; that on or about the 9th day of October, 1939, an execution was issued in said action as against any property, real or personal, of the defendants named, and that said execution was duly returned to the Clerk of the Superior Court by the Sheriff of Los Angeles County on the 24th day of October 1939, wholly unsatisfied.

III.

That it is true that prior to the commencement of the action referred to in Paragraph II of these findings, and after the indebtedness upon which said judgment was obtained, had accrued, the defendant, Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill, doing [49] business as Bud Averill's Paradise Cafe, was the owner of and engaged in the cafe and saloon, known as Bud Averill's Paradise Cafe, located at 674-76 South Vermont Avenue, in the City of Los Angeles, County of Los Angeles, State of California.

IV.

That it is true that during the pendency of said action referred to in Paragraph II of these findings, and on or about the 15th day of March, 1939, the defendant, Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill, doing business as Bud Averill's Paradise Cafe, and Virginia O. Averill, his wife, did make, deliver and execute to the defendant, Glenn E. Bodell, a certain chattel mortgage covering all the stock in trade, fixtures, and furnishings and equipment on the business of the said defendant at 674-76 South Vermont Avenue, Los Angeles, California, known as Bud Averill's Paradise Cafe, which chattel mortgage was recorded on July 25, 1939, in Book 16694, Page 377, Official Records for Los Angeles County; that at said time and place, the defendant, Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill, doing business as Bud Averill's Paradise Cafe, and Virginia Othelia Averill, his wife, did make, deliver and execute to said Glenn E. Bodell, a mortgage covering certain real property then owned by said defendant, and more particularly described as follows, to-wit:

Lots 115 and 116, Tract 6052, as recorded in Book 67, Pages 71 and 72 of Maps, Records of Los Angeles, County,

which mortgage was recorded on July 25, 1939, in Book 16749 at page 189, Official Records, Los Angeles County; that prior to the making of said

encumbrance, said real property [50] was free and clear of any and all encumbrances, except that a declaration of homestead had been filed against the same.

V.

That thereafter, and pursuant to a notice posted under and by virtue of the terms of the chattel mortgage, the purported mortgagee purported to elect to take possession of said property so chatteled, and purported to sell the same at public auction; that thereafter, and on or about the 31st day of July, 1939, the said property was purported to have been sold and bought in by the defendant Glenn E. Bodell.

VI.

The Court finds that when executing the chattel mortgage hereinbefore referred to, the said defendant, Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill, doing business as Bud Averill's Paradise Cafe, and Virginia O. Averill, his wife, failed to comply with Section 3440 of the Civil Code of the State of California in that said defendant failed to publish a notice of intention to chattel mortgage said personal property within a seven days period, or at any time prior to the execution of said chattel mortgage covering said personal property as aforesaid, and that the transfer was executed when said *defendant* were contemplating insolvency and was without a valuable or any consideration, and it was fraudulent as against the plaintiff.

The Court finds that the defendant, Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill, doing business as Bud Averill's Paradise Cafe, and Virginia O. Averill, his wife, made, executed and delivered said chattel mortgage, covering the personal property as aforesaid, in contemplation of the insolvency [51] of said Cyrus E. Averill and said Cyrus E. Averill, Jr. also known as C. Edward Averill, Jr., also known as Bud Averill, doing business as Bud Averill's Paradise Cafe, did so for the purpose of evading the payment of a judgment in favor of the plaintiff herein, and that the transfer of said property and the execution of said chattel mortgage were without consideration.

VII.

The Court finds that the defendant Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill, doing business as Bud Averill's Paradise Cafe, and Virginia Othelia Averill, his wife, did on the 15th day of March, 1939, duly make, execute and deliver to the defendant Glenn E. Bodell, a mortgage covering the real property described in Paragraph IV of the findings; that the same was given in violation of Section 3442 of the Civil Code of the State of California, and was without a valuable or any consideration, and given for the purpose of hindering, delaying and defrauding this plaintiff; that said Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr.,

also known as Bud Averill, doing business as Bud Averill's Paradise Cafe, and his said wife, did give said real estate mortgage above referred to, in contemplation of insolvency of said Cyrus E. Averill, Jr., and did so for the purpose of evading the payment of a judgment in favor of the plaintiff herein.

VIII.

That it is true that both the defendants, Cyrus E. Averill, Jr., and Glenn E. Bodell testified that the defendant, Glenn E. Bodell, loaned to the defendant Cyrus E. Averill, Jr., the sum of Eighty-five Hundred Dollars ((\$8500.00)), the Court finds that if said Glenn E. Bodell loaned [52] said sum to the defendant, Cyrus E. Averill, Jr., there was an express agreement entered into by and between them that no security be given for said loan or for any part of the total sum thus lent, if any; and said agreement was fulfilled by the parties until March 15, 1939, when the transactions hereinabove set forth were had, and were entered into voluntarily by defendant Averill.

IX.

That it is true that at the time the said Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill, doing business as Bud Averill's Paradise Cafe, and Virginia O. Averill, his wife, executed and delivered the chattel mortgage hereinbefore mentioned, that no consideration passed from the defendant, Glenn E. Bodell, to the

defendant, Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill, doing business as Bud Averill's Paradise Cafe, or to his said wife, and that said transfer was made without consideration of any kind or character whatsoever.

X.

That it is true that at the time the said Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill, doing business as Bud Averill's Paradise Cafe, and Virginia Othelia Averill, his wife, executed and delivered the real estate mortgage hereinbefore mentioned, that no consideration passed to the defendant Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill, doing business as Bud Averill's Paradise Cafe, or to his said wife, and that said mortgage was made without any consideration of any kind or character whatsoever. [53]

XI.

That it is true that on or about the 9th day of August, 1939, and between the time that said judgment was duly rendered and prior to the date of it being entered and docketed, the defendants Glenn E. Bodell, Bruce Davis and S. Schuer, did incorporate said Paradise Cafe in the State of California and that said cafe is now known as the Paradise Cafe.

XII.

That it is true that following said purported sale referred to in Paragraph V of these findings, the

defendant, Glenn E. Bodell, took possession of the Paradise Cafe, and did turn over the assets so foreclosed to the Paradise Cafe, Inc.

XIII.

That it is true that the defendant, Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill, doing business as Bud Averill's Paradise Cafe, has been examined on supplementary proceedings pursuant to Sections 714, 715 and 717 of the Code of Civil Procedure of the State of California, and said examination failed to disclose any assets out of which the judgment herein referred to could be satisfied, other than the property hereinbefore referred to; and as a result thereof the plaintiff is without any plain, speedy or adequate remedy at law.

XIV.

That it is true that the acts of the defendants in executing said chattel mortgage and real estate mortgage as aforesaid, did intend to and did hinder, delay and defraud the plaintiff herein by concealing and disposing of the assets of the defendant, Cyrus E. Averill, Jr., and that the mortgaging transactions hereinabove set forth [54] were voluntarily accomplished by the defendant Averill to conceal the assets belonging to said defendant, Cyrus E. Averill, Jr., with full knowledge and that the action of Floyd P. Balding, plaintiff, vs. Bud Averill, doing business as Bud Averill's Paradise Cafe, Fred

Anderson and Charles Tobin, defendants, was pending.

XV.

That it is true that the defendant, Paradise Cafe, a corporation, knew when it acquired purported title to the aforesaid cafe and saloon business, and the assets thereof, as hereinabove set forth, that the purported title had been derived in the manner hereinabove set forth, knew the facts set forth in Paragraph IX hereof and in the first paragraph of Paragraph VI hereof, and knew that the attempted and purported transfer of title was fraudulent as to the plaintiff.

XVI.

That it is true that the defendants in furtherance of the scheme to conceal the assets of the defendant, Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill, doing business as Bud Averill's Paradise Cafe, did allow said Cyrus E. Averill, Jr., to assume to act and to act as manager of said cafe known as the Paradise Cafe, and allowed him to enter into possession of said property and to employ help.

XVII.

The Court finds as untrue each and every allegation contained in the answers of the defendants, Cyrus E. Averill, Jr., Glenn E. Bodell and Paradise Cafe, Inc., a corporation, which is in any way in-

consistent with or contradictory to any allegation which the Court has specifically found to be true.

[55]

CONCLUSIONS OF LAW

I.

That the chattel mortgage dated March 15, 1939, made by the defendant, Cyrus E. Averill, Jr., and his aforesaid wife, in favor of Glenn E. Bodell, covering the stock in trade, fixtures and equipment contained in the cafe known as Bud Averill's Paradise Cafe, is fraudulent as against the plaintiff.

II.

That the mortgage dated March 15, 1939, made by the defendant, Cyrus E. Averill and his aforesaid wife, in favor of Glenn E. Bodell, covering Lots 115 and 116, Tract 6052, as recorded in Book 67, pages 71 and 72 of Maps, Records of Los Angeles County, is fraudulent as against the plaintiff.

III.

That said conveyances were made and given by the defendant, Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill, doing business as Bud Averill's Paradise Cafe, and his aforesaid wife, without any consideration, and for the sole purpose of defrauding the plaintiff herein, and while in contemplation of insolvency of said Cyrus E. Averill, Jr.

IV.

That by reason thereof the conveyances made by the defendant, Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill, doing business as Bud Averill's Paradise Cafe, to Glenn E. Bodell and his said wife, are vacated and set aside and declared null and void for any purpose whatsoever, in so far as concerns the plaintiff herein. [56]

V.

That the restraining order heretofore issued against the defendants restraining them from selling, transferring, encumbering, or in anywise disposing of or hypothecating the said real or personal property, shall continue in effect until further order of the Court.

VI.

That the plaintiff is entitled to have his costs and disbursements herein expended.

WILLIAM J. PALMER (Signed)

Judge of the Superior Court.

[57]

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 448466

FLOYD C. BALDING,

Plaintiff,

vs.

CYRUS E. AVERILL, JR. also known as C. ED-
WARD AVERILL, JR. also known as BUD
AVERILL doing business as BUD AVER-
ILL'S PARADISE CAFE; PARADISE
CAFE, INC., a corporation, GLEN E. BO-
DELL, BRUCE DAVIS and A. SCHUER,
Defendants.

JUDGMENT.

The above entitled cause came on regularly for trial on June 3rd, 1940, and was actually tried on June 4th, 1940 and continued on trial on June 5th, 1940, in Department 12 of the above entitled Court, sitting without a jury, jury having been expressly waived, Honorable William J. Palmer, Judge presiding; David C. Levenson, Esq., appearing for the plaintiff, and Messrs. Paul Hitch and Charles W. Rollinson, appearing for the defendants; and evidence both oral and documentary having been introduced, and the case argued and submitted for decision and the Court having heretofore made and caused to be filed herein its written findings of fact and conclusions of law, and being fully advised;

Wherefore, by reason of the law and the findings [58] of fact,

It is ordered, adjudged and decreed that the Chattel Mortgage dated on or about March 15th, 1939, made by the defendant, Cyrus Edward Averill, Jr., and Virginia O. Averill, his wife, in favor of Glen E. Bodell, covering stock in trade, fixtures and equipment contained in the cafe known as Bud Averill's Paradise Cafe, which mortgage was recorded July 25, 1939 in Book 16694, Page 377, Official Records L. A. County, be and the same is hereby vacated and set aside, and declared null and void for any purpose whatsoever, insofar as concerns Plaintiff herein, and

It is further ordered, adjudged and decreed that the Mortgage dated on or about March 15th, 1939, made by the defendant, Cyrus Edward Averill, Jr. and Virginia Othelia Averill, his wife, in favor of Glen E. Bodell, covering Lots 115 and 116, Tract 6052, as recorded in Book 67, Pages 71 and 72 of Maps, Records of Los Angeles County, which mortgage was recorded July 25, 1939 in Book 16749, at page 189, Official Records for Los Angeles County, be and the same is hereby vacated and set aside, and declared null and void for any purpose whatsoever, and

It is further ordered, adjudged and decreed, that the restraining order heretofore issued against the defendants, restraining them from selling, transferring, encumbering or in anywise disposing of or hypothecating the aforesaid real or personal prop-

erty, shall continue in effect until further order of the Court, and

It is further ordered, adjudged and decreed that the plaintiff have and recover from the defendants, Cyrus E. Averill, Jr., also known as C. Edward Averill, Jr., also known as Bud Averill doing business as Bud Averill's Paradise Cafe, Glen E. Boddell, and Paradise Cafe, Inc., a corporation, his costs [59] and disbursements incurred herein, in the sum of \$15.35.

Dated: July 2nd, 1940.

(Signed)

WILLIAM J. PALMER

Judge of the Superior Court.

[60]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, R. S. Zimmerman, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 60 inclusive contain full, true and correct copies of Petition in Bankruptcy; Objections to Discharge; Order by Referee Denying Discharge; Referee's Memo. of Decision; Petition for Extension of Time to File Petition for Review; Order Extending Time to File Petition for Review; Petition for Review; Certificate of Referee on Petition for Review; Order of District Judge Confirming Order of Referee; Notice of Ap-

peal; Directions for Service of Notice of Appeal; Statement of Points on Appeal; Stipulation Designating Contents of Record on Appeal; Stipulation as to Contents of Record on Appeal with Exhibits (a), (b) and (c) Thereto; Bond for Cost on Appeal; Stipulation for Extension of Time to Docket Appeal and Order Extending Time to Docket Appeal, which together with the Reporter's Transcript of Testimony transmitted herewith constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the Clerk for comparing, correcting and certifying the foregoing record amount to \$10.35, which amount has been paid to me by Appellant.

Witness my hand and the seal of the said District Court this 30th day of January, A. D. 1942.

(Seal)

R. S. ZIMMERMAN,

Clerk,

By: EDMUND L. SMITH,

Deputy.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF TESTIMONY
AND PROCEEDINGS AT HEARING ON
OBJECTIONS TO DISCHARGE OF BANK-
RUPT.

Los Angeles, California, April 18, 1941.

Appearances of Counsel:

For the Trustee:

NAT ROSIN, Esq.

111 W. 7th St., Los Angeles, Cal.

For Objecting Creditors:

KENNETH E. MATOT, Esq., and

DAVID C. LEVENSON, Esq.

542 South Broadway,

Los Angeles, California.

For the Bankrupt:

PAUL HITCH, Esq.

742 So. Hill St.

Los Angeles, California. [1*]

Los Angeles, California,

Friday, April 18, 1941, 2 P. M.

Mr. Rollinson: With reference to the objections to discharge, I don't believe I have any standing in Court except in so far as my client, Mr. Bodell, is charged with conspiracy in connection with it. I don't represent Mr. Averill.

[*Page numbering appearing at top of page of original Reporter's Transcript.]

The Referee: Who is going to appear for Mr. Averill on the objections?

Mr. Hitch: I will appear for Mr. Averill, your Honor.

Mr. Rosin: The trustee is represented by Nat Rosin, and one of the creditors, Floyd C. Balding, who is objecting, is represented by David Levenson. I will call the representative from the Superior Court.

Mr. Rollinson: There will be no necessity for that. We will stipulate that the record will speak for what it is, and it seems to me, so far as Mr. Balding is concerned, we will stipulate that the judgment of the Court and the findings of fact in that particular case may be considered as the evidence in the situation and as part of the record.

Mr. Levenson: In other words, you are stipulating the entire record in the Superior Court?

Mr. Rollinson: I don't see why Mr. Hitch could not do that as attorney for Mr. Averill.

Mr. Rosin: I want to understand the interest of Glenn [2] E. Bodell in the interest of the discharge to Mr. Averill.

The Referee: I don't think he can be a party.

Mr. Rollinson: He is not interested except he is charged with conspiracy in these objections.

The Referee: He is not a party.

Mr. Rosin: No, he is not a party.

The Referee: No judgment on the objections to discharge would bind Mr. Bodell.

Mr. Rollinson: Then I think I can be excused and retire from the Court room.

The Referee: We are glad to have you here.

Mr. Rosin: For the record, I just don't want to have any confusion.

Mr. Hitch: Yes, I will stipulate.

Mr. Levenson: So stipulated, is that right, Mr. Hitch?

Mr. Hitch: Let's see what it is.

The Referee: Do you want Mrs. Averill on the objections?

Mr. Levenson: We don't need her.

The Referee: Mrs. Averill is excused, if she cares to go.

Mr. Rollinson: And may her attorney be excused?

The Referee: The record may so show.

(Discussion off the record.)

The Referee: Specification No. 5 reads:

“That in the course of the proceedings in bankruptcy, the said bankrupt, [3] Cyrus E. Averill, Jr., constructively refused to obey the order of the Court in this, that he caused the petition in bankruptcy of the fraudulently formed Paradise Cafe, Inc., a corporation, to be filed and thereby caused the property which had been fraudulently transferred to Glenn E. Boddell and Paradise Cafe, Inc., a corporation, to be listed as assets of the Paradise Cafe, Inc., a corporation, when as a matter of fact the said assets were assets of Cyrus E. Averill, Jr., and that said transfer by the said bankrupt, Cyrus

E. Averill, Jr., to the said Glenn E. Bodell and by the said Glenn E. Bodell to the Paradise Cafe, Inc., a corporation, was declared by the order of the Superior Court in case No. 448466 to be fraudulent, which said fact was known to said Cyrus E. Averill, Jr., the bankrupt herein, and that by said conspiracy the Trustee in Bankruptcy in this case was unable to secure all of the assets which in fact was the property of this said bankrupt."

How did he refuse to obey any order of Court in the proceeding in bankruptcy?

Mr. Rosin: I don't think that was meant. It was the order of the Superior Court.

The Referee: I know, but that is not a ground of objection.

Mr. Rosin: No, but specifications 3, 4, 5, 6, and 7 are practically all tied up together on the same theory.

The Referee: I thought what you were trying to state [4] was a ground of objection in connection with a proceeding in bankruptcy, that he refused to obey the lawful order of Court.

Mr. Levenson: As counsel states, 3, 4, 5, and 6 practically read together.

The Referee: All right, proceed.

Mr. Levenson: Mr. Averill.

Mr. Rosin: Just a moment. Mr. Hitch, I understand that you are stipulating that this is the original file of pleadings and documents in Superior

Court action No. 448,446, of Floyd C. Balding versus Cyrus E. Averill, Jr., et al.

Mr. Hitch: That is right.

Mr. Rosin: Likewise this envelope 50164, is an envelope containing the exhibits filed in the action of Floyd C. Balding versus Averill.

Mr. Hitch: I believe that is correct.

Mr. Rosin: As I understand it, we cannot offer these as exhibits in this Court, but we may read from them into evidence.

The Referee: That is correct. The Clerk will insist on taking them back.

Mr. Rosin: Proceeding to the file in case 448,466, Superior Court of the County of Los Angeles, I call attention to the fact that the complaint has been filed in this action as set forth by the record on January 24, 1940, complaint to set aside fraudulent chattel mortgage and [5] foreclosure sale thereunder, and to set aside fraudulent trust deed.

Mr. Hitch: So stipulated.

Mr. Rosin: I presume the Court is going to take notice of this file and read the pleadings. There is no need of my reading the pleadings in the record. I am just trying to save time here.

The Referee: You can make that arrangement with the reporter. Indicate the papers that you want in the record and the reporter can, if the record has to be written up, go over to the Superior Court and copy them off.

Mr. Rosin: That is a good suggestion; I would like to do that, your Honor.

The Referee: Don't make it too voluminous. You will have a pretty heavy record if it is to go up. Do you want the complaint?

Mr. Rosin: I want the complaint, the Balding complaint that has been filed. There is no amended complaint, so there is only one complaint .

Mr. Hitch: I don't think there was any demurrer; a straight answer, as I remember it.

Mr. Rosin: I want the complaint of the plaintiff, likewise I want the findings of fact and conclusions of law that were filed on July 2, 1940, and were signed by Judge William J. Palmer of the Superior Court. [6]

The Referee: What is the date?

A. The order has no date, your Honor.

The Referee: The findings.

Mr. Rosin: Filed July 2, 1940, but there was no date in the document itself as to when they were signed.

Mr. Hitch: They were signed that date, as I remember.

The Referee: Just for identification, filed July 2, 1940.

Mr. Rosin: Yes, entitled "Findings of Fact and Conclusions of Law." Likewise, we want the judgment that was entered on July 5, 1940, filed July 2, 1940, and which was docketed on July 5, 1940, in Book 1085 at page 158, which judgment was signed on July 2, 1940, by William J. Palmer as Judge of the Superior Court. Likewise, the document

entitled "Notice of Entry of Judgment," which was filed July 11, 1940, and which is as dated July 10, 1940, and signed by David C. Levenson, as attorney for the plaintiff, which on its back purports to show service received July 10, 1940, by Paul Hitch, initialed "H. N." as attorney for the defendant.

Mr. Hitch: That is right.

Mr. Rosin: That is all we want from this file to be made a part of the record. We are not offering this as exhibits, so I will not offer this for the inspection by the Court, the envelope containing the exhibits which are part of that file, but there is no particular document [7] which I wish made part of this record.

The Referee: Then I better not see it if you are not going to offer it as part of the record.

Mr. Levenson: I suggest we make it part of the record.

The Referee: Then the reporter will copy every document if he is to make a transcript.

Mr. Levenson: Can we suggest this, can the Court examine the exhibits and verify them with the various findings so that the Court will know what they are, not for the purpose of making it part of the record, because the findings themselves refer to the exhibits; merely for the purpose so that the Court may identify those particular instruments. Can we let your Honor look at them for identification purposes?

The Referee: I don't think so. I can only see that or hear that which is part of the record here.

Mr. Levenson: This is part of the record.

The Referee: Part of the record of the Superior Court, but it is not part of the record here. This mortgage you have been talking about on real property, what real property was that?

Mr. Levenson: That is the real property in this other testimony.

The Referee: The home property.

Mr. Levenson: Yes.

Mr. Hitch: That was the one also set aside, the one on [8] the business and trust deed on the house.

Mr. Levenson: It was a mortgage, a straight note and mortgage.

Mr. Rosin: As I remember, Mr. Rollinson offered that file at the time he opened the case on behalf of Mrs. Averill and the Trustee in Bankruptcy.

Mr. Hitch: I believe that is correct.

The Referee: I would make the same ruling, then.

Mr. Rosin: I was trying to refresh my memory, whether it was in that record.

The Referee: All right. Leave this here for a few minutes.

Mr. Rosin: Now, we offer it as an exhibit, for the purpose of this record, pursuant to your Honor's statement before as to how it shall be drawn up in the transcript, the mortgage dated March 15, 1939, between Cyrus E. Averill, Jr., and Virginia Othelia Averill, husband and wife, to Glenn E. Bodell, which

mortgage was executed March 15, 1939, and recorded July 25, 1939, and is now Plaintiff's Exhibit No. 9, having been received as such on June 4, 1940, in action No. 448,466 in the Superior Court. We also offer the chattel mortgage dated March 15, 1939, between Cyrus Edward Averill, Jr., and Virginia O. Averill, husband and wife, to Glenn E. Bodell, which was executed March 15, 1939, recorded July 25, 1939, introduced as Plaintiff's Exhibit No. 7 on June 4, 1940, in action No. 448,466 in [9] the Superior Court. Likewise, we offer document entitled Notice of Mortgagee's election to take possession, etc., by virtue of the terms and covenants of a certain chattel mortgage executed by you to the undersigned on the 15th day of March, 1939, which notice is dated July 25, 1939, purportedly signed by Glenn E. Bodell and addressed to Cyrus Edward Averill, Jr. and Virginia O. Averill, husband and wife, now Plaintiff's Exhibit No. 8 in action No. 448,466 of the Superior Court, June 4, 1940, and attached to this and made a part of the same exhibit is another document entitled Notice of Sale and Chattel Mortgage, both being the same exhibit, the two separate documents, Plaintiff's Exhibit No. 8.

The Referee: You are offering the entire Plaintiff's Exhibit 8.

Mr. Rosin: That is it, on June 4th. Do you want to see these three I have offered? The others I will return, the envelope I will return.

The Referee: All right. Proceed.

Mr. Rosin: I will call Mr. Averill. [10]

CYRUS E. AVERILL, JR.,

called as a witness on behalf of the Trustee, having been first duly sworn, testified as follows:

The Referee: State your name.

The Witness: Cyrus E. Averill, Jr.

Mr. Rosin: The witness is being called pursuant to Section 21-J, your Honor, as a hostile witness.

The Referee: Very well.

Direct Examination

By Mr. Rosin:

Q. Mr. Averill, how long were you in business at the address 674 South Vermont?

A. Well, I was in business there from September, 1933, until about September, 1934, then I sold out. I had a partner when I went in there, and I sold out to him and went to Honolulu with a show. I came back in November of that year. He closed the place up in the meantime. Then I was still on the lease and I was forced to reopen it. That was in November, 1934, and I operated it up until the time that Bodell came in, which I think was in July of 1939, I believe.

Q. From then on it was Paradise Cafe?

A. Paradise Cafe, Inc.

Q. You were working for them,

A. I was working for them. [11]

Q. Until the time——

A. Then it was changed to Airport Cafe.

Q. Was it Airport Cafe prior to the bankruptcy?

A. No.

(Testimony of Cyrus E. Averill, Jr.)

Q. That is what I mean; up until the time of bankruptcy——

A. It was known as Bud Averill's Paradise Cafe, up until the time Mr. Bodell came in and foreclosed on the chattel mortgage and he formed Paradise Cafe, Inc.

The Referee: Let me get that straight in my mind. Before the foreclosure of Bodell's mortgage, what was the name of the cafe?

A. Bud Averill's Paradise.

Q. After the foreclosure of the mortgage and the change of possession, what was the name?

A. Paradise Cafe, Inc.

Q. But you already used your name, Bud Averill, on the outside of the building?

A. The name has always been there.

The Referee: Go ahead.

Q. By Mr. Rosin: In other words, from 1933 to the early part of 1934, you were in partnership with another person at this address?

A. From September, 1933, up until September 1934, about a year.

Q. Then you came back from Honolulu and you operated [12] at that location a place called Bud Averill's Cafe up to the time when the foreclosure took place under the chattel mortgage, which you testified was about July, 1939?

A. That is right.

Q. It was during that period that you were the

(Testimony of Cyrus E. Averill, Jr.)

individual owner that is, from 1934 until the middle of 1939, we will say? A. Yes, sir.

Q. Did you have any partners during that time?

A. Only one partner. I never had any partner from the time I reopened it in November of 1934.

Q. Until the time of the foreclosure?

A. No sir.

Q. After this Paradise Cafe, Inc. took over the place under the foreclosure, you continued your operations in that place personally, I mean, you were there?

A. I was there as manager and the use of my name.

Q. Pardon me?

A. I was hired as manager, with the understanding that they could use my name, keep my name out there, and that was for the consideration that they would pay off the indebtedness accumulated.

Q. Was there any period of time during which you were not present at the place, and I am speaking of the time when the foreclosure took place and the corporation took over, were you there day after day? [13]

A. Well, I went on a vacation. I was away about three weeks; went up into Utah shortly after the Paradise Cafe was incorporated.

Q. But at the time the foreclosure took place, do you remember what day that was?

A. I don't exactly. I believe it is in the records.

(Testimony of Cyrus E. Averill, Jr.)

Q. I believe July 29th, if those records are correct.

The Referee: What is that?

Mr. Rosin: The date when the foreclosure took place.

The Referee: Or sale.

Mr. Rosin: Yes, I think it was July 29th.

The Referee: The sale was on the 30th day of July, 1939.

Q. By Mr. Rosin: Up to and including July 30, 1939, you were at the place of business operating it?

A. Well, Mr. Bodell came in and served notice. I still stayed on there, but he did, too.

Q. How many days prior to the sale did he come into the picture?

A. Well, about eight or nine days, I believe.

Q. But you were there during all of those eight or nine days? A. Yes sir.

Q. The place was operating and you were in charge at the time of sale? A. Yes. [14]

Q. After the sale took place on July 30th, as I recall the date, assuming the next day was not Sunday, did the place open up for business the next day? A. Yes.

Q. Were you there that day, the next day after?

A. The next day after it opened?

Q. The day after the sale. I want to get myself clear. A. Yes, I was there.

(Testimony of Cyrus E. Averill, Jr.)

Q. You were there as an employee?

A. I was there, as I recall it, until I had transferred the liquor license, and so forth, in order that they could get that straightened out and get their Paradise Cafe, Inc. going. That is when I left.

Q. But were you on the payroll of Paradise Cafe, Inc. the day after the sale? A. Yes.

Q. You were on the payroll, at least, up to the time when you left for those three weeks vacation?

A. Yes.

Q. Were you paid for those three weeks vacation? A. Yes.

Q. By Paradise Cafe, Inc.? A. Yes.

Q. Then you came back and you operated in the same capacity as you had before you left for your vacation. I am speaking about after your vacation now, not before that. [15]

A. I came back as manager and entertainer.

Q. The same job you occupied before you left for your vacation? A. Yes.

Q. Have I made myself clear on that?

A. I believe that is right.

Q. You were manager and entertainer for Paradise Cafe, Inc., or Paradise Cafe up until the time the petition in bankruptcy was filed by the corporation, is that correct? A. That is right.

Q. You did not have any financial interest in the new corporation? A. I did not.

Q. Didn't invest any money in it?

A. No sir.

(Testimony of Cyrus E. Averill, Jr.)

Q. Is that the corporation that was owned solely by Mr. Bodell?

A. Yes, he was president, and his brother-in-law, too, they with me were officers of the corporation.

Q. He was the principal stockholder and largest money man in the corporation?

A. That is right. [16]

CYRUS E. AVERILL, JR.,
recalled.

Mr. Levenson: The witness is being examined under Section 21-J.

Q. Mr. Averill, do you recall that Paradise Cafe, Inc. was formed in August, 1939?

A. I wouldn't say for sure. I believe that is the date.

Q. At that particular time, or prior to that time, Bud Averill's Paradise Cafe had its bank account at the Bank of America, Wilshire and Shatto Place, isn't that true? A. That is true.

Q. Subsequent to that time Paradise Cafe, Inc. had its bank account at the same place, isn't that right? A. Paradise Cafe, Inc.

Q. In other words, there had been a transfer of your account into the account of the corporation account?

A. I believe that the new Paradise Cafe, Inc. opened their own bank account and set of books.

(Testimony of Cyrus E. Averill, Jr.)

Q. Didn't they take the funds from the Bud Averill Paradise Cafe account and open a new one for Paradise Cafe, Inc.? A. No.

Q. Isn't that true? A. No. [17]

Q. You signed the checks after it was incorporated, isn't that right?

A. Yes. It required two signatures, Mr. Bodell and myself.

Q. As manager you did practically the same thing that you did prior to the incorporation, isn't that right; you hired and fired, took charge of the place, did everything necessary, except Mr. Bodell used to come around occasionally?

A. No, Mr. Bodell was very much in evidence there. He put in some new people in there, put his brother-in-law in.

Q. Didn't you testify, Mr. Averill, that you hired and fired, in the last proceeding we had in the Superior Court?

A. I possibly did, I can't say for sure, but Mr. Bodell was very much in the place and he made several changes in there himself.

Q. You signed the checks. Either one of you could sign?

A. No, I believe at that time he had to sign.

Q. Do you know definitely whether that was the fact? A. Yes, that was the fact.

Q. Mr. Averill, at the time you gave the chattel mortgage to Mr. Bodell, that is, at the time you

(Testimony of Cyrus E. Averill, Jr.)

named him as mortgagee in that chattel mortgage, did you file notice of intention to chattel mortgage under our statute or did [18] you have anyone else do it for you?

A. What was your question, please?

(Question read.)

A. Well, that was all handled through Mr. Bodell's attorney, I believe.

Q. Mr. Bodell's attorney? A. Yes.

Q. You were the mortgagor?

A. That is right.

Q. Mr. Bodell was the mortgagee?

A. Yes.

Q. Who was Mr. Bodell's attorney?

A. Mr. Sheur.

Q. Isn't it a fact that Mr. Scheur was not admitted to practice law in the State of California?

A. I mean, he drew the papers up in Mr. Rollins's office. He was a notary public, I believe.

Q. And he drew up that notice of sale under the chattel mortgage, isn't that right?

Mr. Hitch: That is right.

Mr. Levenson: I think counsel will stipulate to that.

Mr. Hitch: Yes.

Mr. Levenson: Counsel will likewise stipulate that there was no notice of intention to sell in the seven-day period between the time of sale and notice under Section 3440. [19]

(Testimony of Cyrus E. Averill, Jr.)

Mr. Hitch: I will stipulate that the Court so found. I believe that is true.

Mr. Levenson: You remember that Mr. Rollinson stated to the Court that that was done.

Mr. Hitch: I believe that is true.

Mr. Levenson: That is all.

The Witness: Six days instead of seven. As I understand it, there was one day lacking the seven days when we made the sale.

The Referee: That is quite important, gentlemen, if there was any notice given at all.

The Witness: There was, your Honor.

Q. Do you have it in this record when it was given?

Mr. Hitch: I believe it is in this record.

The Referee: No, that is the notice of the election to sell. We are talking about the notice of intention to mortgage.

Mr. Levenson: There wasn't any, Mr. Hitch, you remember Mr. Rollinson stated so.

The Referee: Why do you state it was only six days; where do you get that from?

The Witness: The way I understand the law, it is supposed to be seven days from the time they file. I know they came out and picked up the notice in the kitchen and went outside the building.

The Referee: Was that notice to sell? [20]

The Witness: Notice of intention by Bodeh to take over.

The Referee: To foreclose?

(Testimony of Cyrus E. Averill, Jr.)

The Witness: To foreclose.

The Referee What I am talking about is, when you gave the chattel mortgage, this instrument here, which is Plaintiff's Exhibit 7 in the Superior Court case, when you gave that did you give any notice that you were going to give that chattel mortgage?

The Witness: That I don't know.

Mr. Hitch: What was the evidence on that?

Mr. Levenson: The evidence was, and Mr. Rollinson admitted there was no such notice; the evidence showed there was no notice of intention or any compliance with Section 3440.

The Referee Anything else?

Mr. Levenson: That is all.

The Referee: Any questions, Mr. Hitch?

Mr. Levenson: Do you have any questions, Mr. Rosin?

Mr. Rosin No, that is all.

The Referee: Do you have any questions, Mr. Hitch?

Mr. Hitch: I don't think so.

Mr. Rosin: One question. You were operating a cafe, had always operated a cafe, had you not, from 1934 to 1939, eating and drinking places?

A. Yes. [21]

The Referee: Anything else?

Mr. Hitch: Is your Honor clear of this complete transaction, as to any questions in that record that you want to be enlightened on?

(Testimony of Cyrus E. Averill, Jr.)

The Referee: When we get through with the evidence.

Mr. Hitch: That is all.

Mr. Rosin: The findings of fact, Section 6 thereof, relate that the said defendant failed to publish a notice of intention to chattel mortgage within a seven-day period or at any time prior thereto.

Mr. Hitch: I think that is true.

The Referee: Step down, please.

Mr. Levenson: That is all.

The Referee: Are you all through now?

Mr. Levenson: We are all through. We stand on the record and the testimony.

Mr. Hitch: We are all through.

(Argument.)

The Referee: I will mark it submitted, 7, 7, and 5. [22]

State of California,
County of Los Angeles—ss.

I, E. N. Frankenberger, hereby certify that the foregoing 22 pages of typewritten matter comprise a full, true and correct transcript of the testimony and proceedings adduced at the hearing before the Hon. Benno M. Brink, Referee in Bankruptcy, at Los Angeles, California, on April 18, 1941, at 2 o'clock P. M., in the matter of Cyrus E. Averill, Jr., Bankrupt, No. 36534-C, with the exception of

certain testimony relating to the keeping of books and accounts by the bankrupt.

E. N. FRANKENBERGER

[Endorsed]: Filed Sept. 11, 1941. [23]

[Endorsed]: No. 10036. United States Circuit Court of Appeals for the Ninth Circuit. Cyrus E. Averill, Jr., Appellant, vs. Francis F. Quittner, Trustee in Bankruptcy of the Estate of Cyrus E. Averill and Floyd C. Balding, Appellees. Transcript of Record Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed January 31, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the Circuit Court of Appeals for
the Ninth *District*

No. 10036

CYRUS E. AVERILL, JR.,

Appellant,

vs.

FRANCIS F. QUITTNER, Trustee in Bankruptcy
of the Estate of Cyrus E. Averill, Jr., and
Francis C. Balding,

Appellees.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY ON THE
APPEAL, AND DESIGNATION OF THE
PORTIONS OF RECORD FOR CONSID-
ERATION THEREOF

A. STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY ON THE
APPEAL.

In connection with the appeal taken herein by
Cyrus E. Averill, Jr., Bankrupt, from the judgment
entered in the above entitled proceedings on No-
vember 1, 1941, confirming the order of the Referee
in Bankruptcy, denying the discharge of said bank-
rupt, the Appellant, the bankrupt above named,
hereby, pursuant to Federal Rules of Civil Pro-
cedure No. 75-D, and Rule 19-(6) of the Circuit
Court of Appeals, refers to the Points on which he
intends to rely on the appeal as filed in the Dis-

trict Court and set out in the District Court Clerk's transcript of record upon appeal at pages 27-28, inclusive.

B. DESIGNATION OF PORTIONS OF THE RECORD FOR CONSIDERATION THERE-OF.

Comes now Appellant and designates portions of the record necessary for the consideration of the points on appeal as designated:

1. Bankrupt's voluntary petition.
2. Objections to Bankrupt's discharge.
3. Memorandum of Decision by Referee.
4. Order Denying Discharge, by Referee.
5. Petition of Bankrupt for extension of time to file Petition for Review of Referee's Order.
6. Order extending time to file Petition for Review, by the Referee.
7. Petition of Bankrupt for Review of Referee's Order.
8. Certificate of Referee on Review set out in the District Court Clerk's Transcript of Record upon Appeal at page 21.
9. Order of the District Court confirming the Referee's Order denying discharge and set out in the District Court Clerk's Transcript of record upon appeal at page 24, and dated November 1, 1941.
10. Notice of appeal by Bankrupt to the Circuit Court.

11. Original stipulation and stipulation as to additional records with reference to the contents of the Record on appeal.

a. Complaint in Superior Court case.

b. Findings of Fact and Conclusions of Law.

c. Judgment in Superior Court case.

12. The testimony referring to Reporter's transcript, 1 volume, and the exhibits as set forth in the stipulation as to contents designated item No. 11.

13. Directions for service of notice of appeal.

14. Statement of Points on Appeal.

Dated: January 27, 1942.

Respectfully submitted,

MARTIN GENDEL,

Attorney for Appellant

Received copy of the within Statement of Points on Which Appellant Intends to Rely on Appeal and Designation of Portions of Record for Consideration Thereof this 30th day of Jan., 1942.

NAT ROSIN

KENNETH E. MATOT

DAVID C. LEVENSON

By NAT ROSIN

Attorneys for Appellee.

[Endorsed]: Filed Jan. 31, 1942. Paul P. O'Brien,
Clerk.

No. 10036.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CYRUS E. AVERILL, JR.,

Appellant,

vs.

FRANCIS F. QUITTNER *et al.*,

Appellees.

BRIEF FOR APPELLANT.

MARTIN GENDEL,

607 James Oviatt Building, Los Angeles,

Attorney for Bankrupt Appellant.

FILED

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PAUL E. GORDEN,

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I.

None of the specifications relied upon by the referee and district judge, or any portion thereof, state facts sufficient to constitute an objection to the discharge of the bankrupt....	8
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II.

No evidence was introduced at the hearing on the objection to the discharge which, under the law applicable, would sustain a finding that any mortgage or alleged fraudulent transfer was made within twelve months immediately preceding the filing of the petition of bankruptcy in this case....	10
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III.

No evidence was introduced at the hearing on the objections to the discharge which, under the law applicable, would sustain a finding that the alleged fraudulent transfers were a mere scheme or device on the part of the bankrupt, in this case, to conceal his assets with intent to hinder, delay and defraud his creditors during the twelve months immediately preceding the filing of the petition in bankruptcy.....	15
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IV.

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No. 10036.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

CYRUS E. AVERILL, JR.,

Appellant,

vs.

FRANCIS F. QUITTNER *et al.*,

Appellees.

BRIEF FOR APPELLANT.

Opinion Below.

The opinion of the District Judge, set forth at page 28 of the transcript, confirms the order of the Referee denying the bankrupt a discharge, which appears in the transcript at page 11.

Statement of Pleadings and Facts Disclosing Basis of
Jurisdiction.

The bankrupt, and appellant herein, Cyrus E. Averill, Jr., filed a voluntary petition in bankruptcy on the 18th day of June, 1940; pursuant to the provisions of the Acts of Bankruptcy an order [Tr. pp. 1-3] was entered on the same day approving the petition and adjudicating the petitioner as a bankrupt. Thereafter, and in the ordinary course of the administration of the bankrupt estate, Floyd C. Balding, as a creditor and Francis F. Quittner as the

Trustee in Bankruptcy of your petitioner, did file specifications of opposition to the discharge of your petitioner [Tr. pp. 4-11]; a hearing upon said objections was duly held before the Honorable Benno M. Brink, as Referee, on the 18th day of April, 1941, and a reporter's transcript of the testimony and proceedings of the same is set forth in the transcript of record [Tr. pp. 63-83]; after said hearing the matter was taken under submission by the Referee and he did thereafter sign a memorandum of decision upon objections to discharge [Tr. pp. 12-20] and did thereafter sign an order denying the discharge of the bankrupt [Tr. p. 11].

The bankrupt herein, within the time permitted by law, did file a petition for review of the Referee's order denying discharge [Tr. pp. 22-25]. Pursuant to said petition the Referee then prepared and filed a certificate on petition for the review from the order denying the discharge [Tr. pp. 25-28]. The review was then duly argued before Honorable Paul J. McCormick, District Judge, on the 29th day of *September*, 1941, and after the matter was taken under submission the said District Judge did render a decision on the review confirming the order of the Referee, said order of confirmation being made on the 1st day of November, 1941 [Tr. p. 28]. The District Court and the within Circuit Court of Appeals have jurisdiction of said matters involved in this proceeding by virtue of the provisions of the Bankruptcy Act of 1898 and amendments thereto, and particularly Sections 23, 24 and 25 of said Bankruptcy Act. The appeal was taken pursuant to said sections and pursuant to Rules 73, 75 and 76 of the Federal Rules of Civil Procedure.

Statement of the Case and Questions Presented.

(a) STATEMENT OF THE CASE.

On July 21, 1939, Floyd C. Balding, one of the objectors, was awarded a judgment against the bankrupt for approximately thirty-six hundred dollars. On July 25, 1939, four days later, the mortgagee recorded in the office of the county recorder of Los Angeles County a chattel mortgage dated March 15, 1939, and covering the fixtures and equipment of the bankrupt's cafe business. The said chattel mortgage was given to one Glen E. Bodell to secure a certain promissory note executed by the bankrupt in favor of Bodell under date of March 15, 1939. On said July 25, 1939, the same mortgagee also recorded a mortgage dated March 15, 1939, and covering the home occupied by the bankrupt and his wife. This mortgage was likewise given to the said Bodell to secure a note executed in his favor by the bankrupt under date of March 15, 1939. On said July 25, 1939, the said Bodell gave notice of his election to foreclose the chattel mortgage and a few days later became the owner of the assets covered thereby at foreclosure sale. Thereupon he transferred the assets to a corporation known as "Paradise Cafe, Inc.," which he had caused to be formed, and thereafter the business theretofore conducted by the bankrupt was carried on in the name of the corporation with the bankrupt acting as manager, except for a brief period immediately following the transfer to the said corporation.

On January 24, 1940, Balding, who, as we have seen, had been awarded a judgment against the bankrupt on July 21, 1939, commenced an action in the Superior Court of Los Angeles County to set aside the chattel mortgage and also the aforesaid mortgage on the home of the bank-

rupt. Said action went to trial and on June 5, 1940, the trial judge made his decision, in which he held that the two mortgages involved in the action were fraudulent and void as against the said Balding [Tr. pp. 35-61]. However, the formal decree of the Court to this effect was not entered until July 2, 1940; in the meantime, on June 18, 1940, the bankrupt filed the voluntary petition in bankruptcy.

Objections to the discharge of the bankrupt were duly filed [Tr. pp. 4-11; and it is to be noted that the only evidence introduced upon the hearing of said objections consists of the testimony of the bankrupt which is set forth in the reporter's transcript of testimony and proceedings [Tr. pp. 63-83, particularly pp. 72-83] and the stipulated evidence concerning the proceedings in the Superior Court case to set aside the alleged fraudulent chattel mortgage and trust deed consisting of the complaint [Tr. pp. 35-47], the findings of fact and conclusions of law [Tr. pp. 47-58] and the judgment [Tr. pp. 59-62]. No motion was made or granted permitting the introduction of any evidence, such as the testimony of the bankrupt, which might have been given in earlier proceedings, and no other testimony or evidence was presented with reference to this proceeding. However, it becomes obvious by reading the Referee's memorandum of decision, and also the District Judge's order confirming the Referee, that they and each of them took into consideration matters which do not appear of record and were not presented at the hearing on the objections to the discharge.

The findings of facts in the Superior Court and more particularly paragraph IV [Tr. p. 50] and paragraph VII [Tr. p. 52] do specifically find that the bankrupt did, on the 15th day of March, 1939, make, execute and deliver to

the third party, Glen E. Bodell, the documents involved in question in said proceedings; no testimony of any character was introduced which affirmatively or by inference showed any act by the bankrupt herein which had been committed by him after March 15, 1939; and a reading of the findings of fact and conclusions of law and the judgment of the Superior Court indicates, without question, that the judgment herein was predicated upon the acts of the defendant up to the 15th day of March, 1939, and particularly because of his failure to comply with sections such as 3440 and 3442 of the Civil Code of the State of California in failing to publish a notice of intention to chattel mortgage and as is stated in paragraph VIII of the findings [Tr. p. 53], the Court found that even if a substantial sum of money had been advanced by the mortgagee to the bankrupt, nevertheless, failure to comply with Section 3440 would have nullified the attempted transfer.

(b) QUESTIONS PRESENTED.

(1) Do any of the specifications relied upon by the Referee and the District Judge, or any portion thereof, state facts sufficient to constitute an objection to the discharge of the bankrupt?

Was there any evidence introduced at the hearing on the objection to the discharge which, under the law applicable,

(2) would sustain a finding that any mortgage or alleged fraudulent transfer was made within twelve months immediately preceding the filing of the petition of bankruptcy in this case; or

(3) Would sustain a finding that the alleged fraudulent transfers were a mere scheme or device on the part of the

bankrupt in this case to conceal his assets with intent to hinder, delay and defraud his creditors at any time within twelve months immediately preceding the filing of the petition in bankruptcy in this case?

Appellant contends that the order of the District Court

Specifications of Error Relied Upon.

confirming the order of the Referee denying the discharge of the appellant as the bankrupt and the order of the Referee denying the discharge of the appellant as the bankrupt were and each of them was erroneous in that:

1. No one of the specifications, relied upon by the Referee and District Judge, of objections to the discharge of your appellant as bankrupt, or any part thereof, contained facts sufficient to state a valid objection, under the Bankruptcy Act, to the discharge of your appellant.

2. No facts were introduced at the hearing on the objections to the discharge, nor was any evidence introduced which could have sustained a finding of facts that your appellant, as bankrupt, had committed any act within the twelve months immediately preceding the filing of the petition of bankruptcy, which act would have justified the denial of the discharge of your appellant as the bankrupt. No evidence was introduced at the hearing on the objection to the discharge which could sustain a finding that there were any acts on the part of the bankrupt within twelve months prior to the filing of the petition of bankruptcy, which acts constituted a fraudulent transfer by the bankrupt of any assets or which facts might justify a conclusion that there was a transfer or concealment by the bank-

rupt of any assets within that period with intent to hinder, delay or defraud the creditors of appellant. From the evidence introduced at the time of the hearing on the objection to the discharge of the bankrupt it affirmatively appeared, through the findings of the Superior Court, which were *res adjudicata* as to the Referee in Bankruptcy, that no act had been committed by the bankrupt since March 15, 1939, and no evidence contrary to the same could be or was introduced to sustain any findings to the effect that the bankrupt concealed his assets at any time within twelve months immediately preceding the filing of the petition in bankruptcy which in this case occurred on June 18, 1940.

Summary of Argument.

Appellant contends that the record of the evidence introduced at the time of the hearing on the objection to discharge of the appellant as bankrupt clearly and unequivocally sustains the position of the bankrupt that he committed no act which might be designated as being objectionable under the Bankruptcy Act, as far as his discharge is concerned, after March 15, 1939, and his petition in bankruptcy was filed on June 18, 1940, more than twelve months after any possible criticizable act committed by the appellant. Not only were the objections not sufficient in form, but they were not meritorious in fact. The discharge of the bankrupt should not be denied because a Referee sees fit to infer facts from evidence not introduced on the hearing of the objections to the discharge of the bankrupt.

ARGUMENT.

I.

None of the Specifications Relied Upon by the Referee and District Judge, or Any Portion Thereof, State Facts Sufficient to Constitute an Objection to the Discharge of the Bankrupt.

For the sake of clarity we examine the seven specifications of objections in chronological order:

(a) The Referee eliminated specifications 1 and 2 in his memorandum of decision upon objections to discharge [Tr. p. 12] by finding as follows:

“I am entirely satisfied that the first and second objections have not been sustained, . . .”

(b) As to objection No. 3 [Tr. pp. 5-6], the basic allegation therein that on March 15, 1939, the bankrupt caused to be executed and recorded the chattel mortgage in question would eliminate the specification from consideration since it shows on the face thereof that such an act was more than twelve months prior to the commencement of bankruptcy on June 18, 1940. Furthermore, the Referee in his memorandum of decision [Tr. p. 20] points out that there was no violation of Section 29, subdivision b of the Bankruptcy Act, and this is the ground specified as being the offense allegedly committed by the bankrupt under specification 3.

(c) With reference to specification No. 4, the allegation therein refers to the execution and recordation of a mortgage on real property dated March 15, 1939, and the same comments are applicable thereto as are applied to objection

No. 3. In addition thereto, the Referee did not take the transfer with reference to the real property into consideration in denying the discharge to the bankrupt.

(d) An analysis of specification No. 5 indicates that an attempt is made to allege a constructive contempt as to a judgment in the Superior Court not being obeyed by the bankrupt. During the hearing on the objections to the discharge, the Referee commented on this specification as follows [Tr. p. 66]: “The Referee: I know, but that is not a ground of objection.”

(e) Specifications No. 6 and No. 7 may be construed jointly in that they both refer to the fact that the personal property covered by the chattel mortgage referred to herein was scheduled in both the schedules of the corporation which succeeded the bankrupt and of your petitioner, the attempt being to allege a violation under Section 29-(b) of the Bankruptcy Act on the ground that a concealment arose from the manner in which the assets were listed in the schedules. As to these two objections, the Referee, in his memorandum of decision, upon objection to discharge, and particularly as set forth in the transcript at page 20, states as follows:

“However, I cannot agree with counsel for the objectors that there was here a concealment under Section 29 (b) 1 of the Bankruptcy Act by reason of the manner in which the assets here involved were listed in the schedules in this and in the corporation case.
. . .”

Neither specification No. 6 nor No. 7, standing by itself, states facts sufficient to sustain an objection to the discharge of your petitioner.

II.

No Evidence Was Introduced at the Hearing on the Objection to the Discharge Which, Under the Law Applicable, Would Sustain a Finding That Any Mortgage or Alleged Fraudulent Transfer Was Made Within Twelve Months Immediately Preceding the Filing of the Petition of Bankruptcy in This Case.

Trusting that the statement will not be considered repetitious, we again point out that the only evidence with reference to the alleged fraudulent transfers, as far as the acts of the bankrupt are concerned, terminate with the 15th day of March, 1939, and the bankruptcy was not filed until June 18, 1940, and this Court as well as the Referee and District Court should be bound on the theory of *res adjudicata* by the findings of the Superior Court as set forth in paragraph IV [Tr. p. 50] and paragraph VII [Tr. p. 52] that it was on the 15th day of March, 1939, that the bankrupt did make, execute and deliver to the third party the documents involved in question in the within proceeding.

(a) No evidence was introduced at the hearing on the objections to the discharge which, under the law applicable, would sustain a finding that any mortgage or alleged fraudulent transfer was made within twelve months immediately preceding the filing of the petition in bankruptcy in this case—since the reporter's transcript is a comparatively short one and the exhibits are set forth in the transcript or record, as heretofore designated, counsel for the appellant believes that it

would be advisable not to attempt to summarize the facts as to the evidence introduced, except to state that no evidence was presented to the Referee from which any conclusions could be drawn that this bankrupt had anything to do with what occurred after March 15, 1939, as far as any transfers by himself were concerned. In other words, if his transfers could be criticized, and the Superior Court did hold them void as to one creditor, nevertheless his acts terminated more than twelve months prior to the commencement of the bankruptcy proceedings.

To sustain the ruling of the Referee would mean that this Court would have to find that Section 14-(c), subdivision 4, of the Bankruptcy Act, relating to the discharge of a bankrupt, had been violated. We turn to the latest authority on these matters, Collier on Bankruptcy, 14th Edition, Vol. 1, commencing at page 1358 thereof, summarizing the requirements of Section 14-(c), subdivision 4:

“To sustain an objection under Sec. 14c (4), the proof must show (1) that the act complained of was done subsequent to the first day of the twelve months immediately preceding the filing of the petition in bankruptcy, (2) with intent to hinder, delay, or defraud creditors, (3) that the act was that of the bankrupt or a duly authorized agent, and (4) that the act consisted of transferring, removing, destroying or concealing any of the bankrupt’s property, or permitting any of these acts to be done.”

Further, at page 1360, the same author says:

“In order to justify a refusal of discharge under Sec. 14c (4), it must be shown that the acts complained of were done with an intent to hinder, delay, or defraud his creditors. This intent moreover, must be an actual fraudulent intent as distinguished from constructive intent. . . .”

At page 1362 the same author states as follows:

“The words ‘with intent to hinder, delay, or defraud his creditors,’ moreover, mean for the purposes of defrauding the whole body of the bankrupt’s creditors and not merely a single creditor. . . .”

And again, at page 1363, Collier states:

“Violation of the Bulk Sales Act does not in itself establish the requisite intent. . . .”

Not only was the judgment of the Superior Court predicated upon constructive fraud arising from a failure to file a notice of intention to chattel mortgage and failure to record the same within a reasonable time, but the Superior Court expressly withheld any finding that there was no valid consideration, and admitted that probably there had been considerable moneys theretofore advanced by the chattel mortgagee [Tr. p. 53]; in other words, the Superior Court action was entirely based upon constructive fraud and no actual fraud was proven either in the Superior Court or before the Referee in Bankruptcy.

Rutter v. General Motors Acceptance Corp. (C. C. A. 10th, 1934), 70 Fed. (2d) 479, A. B. R. (N. S.) 628, presents an almost identical situation wherein the Circuit Court of Appeals did reverse a denial of the bankrupt's petition for discharge by the Referee, which denial had been sustained by the District Court.

Both the Referee and District Judge, in the instant case, apparently put some weight upon the authority of the case of *In re McKane* (1907), 158 Fed. 647, to sustain a theory that although the chattel mortgage might have been made, executed and delivered more than twelve months prior to the filing of the petition in bankruptcy, that since the date of the recordation of the same was less than twelve months, that then the discharge could be denied. However, this argument overlooks two very potent factors: (1) That it was the chattel mortgagee holder who recorded the chattel mortgage and the trust deed, not the bankrupt, and (2) the fact that later cases after the case of *In re McKane* have held that the *McKane* case is not good law. As a matter of fact, the judgment in the *McKane* case with reference to the effective date of recordation is purely *dictum* because the discharge was actually granted and the Court points out that the objector had failed to prove an intent to defraud, and this same failure of proof exists in the instant case.

The more recent case of *In re Plank* (D. C., Mont., 1923), 289 Fed. 900, 1 A. B. R. (N. S.) 215, upholds the granting of a discharge although a deed executed beyond

the four months was recorded within the four months' period. The opinion rendered in the *Matter of Thompson* (1930), reported in 16 A. B. R. (N. S.) at page 693, carefully examines the authorities with reference to this problem and the attendant problem of continuing concealment, and rather than to unduly lengthen this brief your petitioner respectfully points out that this case contains an excellent analysis of the entire problem and at page 699, *supra*, the Referee says:

“In addition to the foregoing decisions, which have been considered in detail for the purpose of indicating that the rule of continuing concealment as enunciated by Collier on Bankruptcy is not controlling in this proceeding, there are other and later decisions to the contrary. In *Matter of Plank* (D. C., Mont.), 1 Am. B. R. (N. S.) 215, 289 F. 900, the court held that a transfer of realty to the bankrupt's wife for a nominal consideration beyond the four months preceding filing the petition was not a fraudulent concealment barring a discharge, although the deed was recorded within the four months' period. Since this decision was rendered the Bankruptcy Act has been amended to extend the time to twelve months, but not otherwise changed.”

III.

No Evidence Was Introduced at the Hearing on the Objections to the Discharge Which, Under the Law Applicable, Would Sustain a Finding That the Alleged Fraudulent Transfers Were a Mere Scheme or Device on the Part of the Bankrupt, in This Case, to Conceal His Assets With Intent to Hinder, Delay and Defraud His Creditors, During the Twelve Months Immediately Preceding the Filing of the Petition in Bankruptcy.

It is the contention of appellant that no evidence was introduced other than the act of the bankrupt in making, executing and delivering the chattel mortgage and trust deed above referred to, on March 15, 1939, more than one year prior to bankruptcy. It is, therefore, respectfully submitted that no portion of the transcript of record would sustain a finding that there was a continuing concealment within the twelve months' period in view of the burden of proof required by the law.

In *Remington's* most recent work on bankruptcy, Vol. 7, we find the following discussion at page 497:

"Sec. 3265. 'Secret Trust' in Bankrupt's Favor as Requisite to Proving Fraudulent Transfer a 'Concealment.'—Generally, in order to prove that the concealment still continues and is being knowingly and fraudulently perpetrated, and sometimes also in order to prove that the property is recoverable for the benefit of the estate and therefore 'belongs' to the estate it is necessary to show that a secret trust exists in the bankrupt's favor."

And further, at page 499, the same author states:

"And continuing concealment, such as will suffice to bring within the bar of discharge as a concealment

a transaction originating before bankruptcy, must consist of something more than the mere incidental concealment usually accompanying fraudulent transfers.”

An early, yet apparently well written, opinion considered the problem of continued concealment in the case of *In re Crenshaw* (D. C., Ala., 1899), 95 Fed. 632, 2 A. B. R. 623, at page 633, we find a terse summation of the facts and the law applicable thereto, and we quote therefrom:

“ . . . The evidence shows that the transfer by the bankrupt to his wife was made four months and one week before the filing of the petition in bankruptcy, and there is no evidence of any special concealment about it. While this transfer may have been fraudulent and void in law, and by proper proceedings may have been so declared, and the property transferred secured and subjected by the creditors, or by a trustee for their benefit, to the payment of the bankrupt's debts, yet this does not constitute his oath to the statement that he had no assets a false oath. So far as he was concerned, the transfer to his wife was valid and binding, and he could not impeach it. The property was hers as respects everybody but creditors. The transfer might be shown to be null and void as to creditors but by the bankrupt law it is not declared to be so, inasmuch as it was made more than four months before the petition in bankruptcy was filed. The oath must have been false in fact. There must have been an intentional wrong in making it. It must have been willful, and for the purpose of concealment and to mislead and defraud his creditors. In bankrupt's failing to schedule and deliver up the property for the benefit of his creditors will not bar his discharge, even though the transfer to his wife may

have amounted to constructive fraud and have been void as against creditors. *In re Warne*, 10 Fed. 377, *id.* 12 Fed. 431.”

For further authority sustaining the position of the bankrupt in the within case we cite *In re Hennebry* (D. C., Iowa, 1913), 207 Fed. 882, 31 A. B. R. 231; *Barrett v. Doody* (C. C. A., Ill. 7th, 1937), 92 Fed. (2d) 633, 35 A. B. R. (N. S.) 165. Cases such as *In re Iskovitz* (D. C., Tex., 1926), 13 Fed. (2d) 473, 8 A. B. R. (N. S.) 431, emphasize the degree of proof necessary to sustain a charge of continuing concealment, and at page 474 of the Federal Reports, *supra*, the Court states as follows:

“The case of *In re Dauchy*, 130 F. 532, 65 C. C. A. 78, by the Circuit Court of Appeals for the Second Circuit, through the expression of Circuit Judge Coxe, is in line with other authorities to the effect that a fraudulent concealment, in order to defeat the right to a discharge, must have the element of a secret interest by the bankrupt in the property. It is not sufficient that the property was conveyed in fraud of creditors; it must still, in fact, be the property of the bankrupt’s estate.”

Once again we respectfully urge that the only fact which is before this Court is that the documents in question were made, executed and delivered by the bankrupt on March 15, 1939, more than twelve months prior to the commencement of the bankruptcy proceedings. If the Referee and District Judge found any facts by inference from which they could draw their conclusion of a continuing concealment, these facts are not present in the transcript of record.

IV.

Conclusion.

Without repeating any of the facts, arguments and authorities heretofore urged in the within brief, should the reviewing Court sustain the ruling of the Referee and District Judge denying the discharge to your petitioner? This same problem was considered in the early case of *In re H. D. Berner* (D. C., Ohio, Referee confirmed by a District Judge, 1900), 4 A. B. R. 383, and the charges centered around the conspiracy of the bankrupt's lawyer in taking an asset for an alleged fee, selling the asset and giving the proceeds thereof to the wife of the bankrupt. After a long analysis of the problem the Court comes to the final conclusion, at page 393, as follows:

“In the case at bar hardly a scintilla of evidence was produced to show that the store was held in secret trust in any way for the bankrupt's present use or future benefit. Efforts were made to do so, and the specifications were evidently drawn on the theory that such would be the proof.

“Not the slightest proof of acts or words of either the bankrupt or of Mr. Friend, or of anyone connected with either of them, was brought out to indicate the possibility of a secret trust existing. The conveyance was fraudulent, but the bankrupt's connection therewith ceased when he got the \$3,500 of money in his hands and surreptitiously conveyed it to New York and into his sister-in-law's possession.

“Applying the rule heretofore laid down to the case at bar, it follows that the specifications as to concealment of the art store is not sustained by sufficient proof, and therefore fails.”

The case of *In re Williams* (D. C., S. C., 1921), 286 Fed. 135, 4 A. B. R. (N. S.) 1106, is one in which a discharge was granted in spite of objections complaining of a transfer of a home by the bankrupt to his wife, the bringing of a state court action to set this transfer aside as fraudulent, the denial of fraud, and the reconveyance of the house by the wife to the bankrupt. At page 142 we find the following language:

“ . . . The proof of fraudulent intent should be clear and beyond the realm of speculation or suspicion. The proof should be convincing and should satisfy the conscience of the court that a positive fraud was intended. When two inferences may be drawn, the one pointing to a guilty or bad intent, and the other consistent with honesty and the absence of fraud and deception, it is the duty of the court to find in favor of honesty and the absence of a fraudulent purpose. *In re Brown* (D. D.), 199 Fed. 356, 29 Am. Bankr. Re. 73.”

The Circuit Court of Appeals sustained the granting of a discharge in a case involving a loan from the wife of the bankrupt to the bankrupt and the transfer of real property from the bankrupt to his wife, and, as in the instant case, the strenuous objection that the real property was being held by the wife in secret trust for the bankrupt and that therefore the twelve months' period did not constitute a bar. Your petitioner is constrained to quote from this case as the concluding authority herein, because it so well summarizes the opinion of your petitioner in considering the ruling of the Referee and District Judge and the grounds for review which have been urged by your peti-

tioner. The title of this case is *Stanley's Incorporated Store No. 3 v. Neiderheiser* (C. C. A. 8th, 1930), 45 Fed. (2d) 489, 17 A. B. R. (N. S.) 23. At page 490 we find the following language as to the authority of this Court in reviewing the ruling of the Referee:

"The report of the referee as to the facts and his conclusions of law is advisory merely, and it is the duty of the court to exercise an independent judgment on the question of discharge."

At page 491 we find the following appropriate language:

". . . While the peculiar circumstances of this loan arouse some suspicion, we cannot determine the case upon suspicion. The burden was on appellant to show that in fact title was held in trust by the wife for the husband. The evidence is not sufficient so to show."

At page 492 we quote:

"Fraud, of course, is not to be presumed. Discharge in bankruptcy is a legal right to be granted by the court, unless it appears that the bankrupt has done some of the things which under the statute (Title 11, U. S. C. A., Sec. 32) are a bar to a discharge."

Wherefore, appellant prays that the order of the Referee and the District Judge denying the discharge be reversed, and an order made and entered granting to appellant his discharge in bankruptcy.

Respectfully submitted,

MARTIN GENDEL,

Attorney for Bankrupt Appellant.

No. 10036

IN THE ⁶
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

CYRUS E. AVERILL, JR.,

Appellant,

vs.

FRANCIS F. QUITTNER *et al.*,

Appellees.

APPELLEES' REPLY BRIEF.

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APPELLEES' REPLY BRIEF.

The record in this matter appears to present only three questions to be determined by the Court, namely:

1. Whether or not fraudulent transfer occurred within one year of the date of the filing of the petition in bankruptcy;
2. As to whether or not the appellant in this matter has sustained the burden of proof that was shifted to him under the provisions of Section 14-(c) of the Bankruptcy Act;
3. Whether or not the specifications of objection to the discharge are sufficient and if any question as to the sufficiency may be raised for the first time on appeal.

These questions will be discussed in the order given.

Statement of Case and Questions Presented.

The facts as disclosed by the records are as follows:

The bankrupt was engaged in the cafe business in the City of Los Angeles on the 21st day of July, 1939; one of the appellees, Floyd C. Balding, secured a judgment against the bankrupt, Cyrus E. Averill, in the sum of approximately \$3,600.00. On July 25th, 1939, four days later, and before the said Floyd C. Balding could have secured an execution in said case in which said judgment was entered, there was recorded in the office of the County Recorder of Los Angeles County a chattel mortgage dated March 15th, 1939, covering the fixtures and equipment of the bankrupt's cafe business; said chattel mortgage being given to one Glen E. Bodell to secure a promissory note executed by the bankrupt in favor of Glen E. Bodell under date of March 15th, 1939; that at the time of the hearing in the bankruptcy matter Glen E. Bodell testified that this note was given to secure antecedent advances made to the bankrupt herein.

On the 25th day of July, 1939, there was also recorded a mortgage dated March 15th, 1939, covering the real property upon which the home occupied by the bankrupt and his wife is located. This mortgage was given to said Glen E. Bodell to secure a note executed by the bankrupt under date of March 15th, 1939. Likewise, on said July 25th, 1939, the said Bodell gave notice of his election to foreclose the said chattel mortgage and a few days later Bodell became the owner of the assets covered thereby at

foreclosure sale. Thereupon Bodeil transferred the said assets to a corporation known as the Paradise Cafe, Inc., which he had caused to be formed, and thereafter the business heretofore conducted by the bankrupt was carried on in the name of the corporation with the bankrupt acting at all times as manager, except, perhaps for a brief period immediately following the transfer of the said assets to the corporation. It should be noted further that at the time the Paradise Cafe, a corporation, filed its petition in bankruptcy, the said petition was executed on behalf of the said corporation by the bankrupt herein as president of the corporation.

On January 24th, 1940, Floyd Balding commenced an action in the Superior Court of the County of Los Angeles to set aside the aforesaid chattel mortgage and also the mortgage covering the real estate of the bankrupt. This action was heard on June 5th, 1940, and the trial judge made his decision in which he held that the two mortgages involved were fraudulent and void as against the said Floyd C. Balding. A decree of the Court was not entered until July 2nd, 1940. [Tr. p. 59 *et seq.*]

In the meantime, on June 18th, 1940, the bankrupt filed his voluntary petition and also a petition on behalf of the Paradise Cafe, a corporation. All of the assets owned by the bankrupt were listed as assets of the Paradise Cafe, a corporation, and not of the bankrupt, Cyril E. Averill. Subsequently thereto the appellees herein filed specifications and objections to the discharge of the bank-

rupt, which were duly heard before the Referee in Bankruptcy, and the Referee filed his memorandum of decision upon the objections to the discharge. [Tr. p. 12 *et seq.*]

The testimony had at the hearing of the objections to the discharge was as set out on page 63 *et seq.* of the transcript.

We believe that it is quite important to keep the following facts in mind in considering the first question, namely: That the chattel mortgage and mortgage hereinbefore referred to were dated March 15th, 1939, but were not recorded until July 25th, 1939. No testimony was offered by the bankrupt as to when delivery was made of these documents and the Court found that delivery was made on the date the instruments were recorded, that is to say, on July 25th, 1939.

Summary of Argument.

Appellees contend that all the errors relied upon by the appellant must be resolved against the appeal, principally because the appellant in the first instance failed to meet the burden of the evidence which was shifted to him upon the making of a *prima facie* case by the appellees. This burden the appellant has failed to meet.

ARGUMENT.

I.

Evidence Introduced at the Hearing by the Appellee Was Sufficient to Make a Prima Facie Showing as Can Be Seen by the Transcript and by the Statement of the Case Made by Both the Appellant and Appellees.

It should be borne in mind that while the chattel mortgage and the mortgage in question appear to have been executed on or about March 15th, 1939, and recorded on the 25th day of July, 1939, there was no evidence offered by the appellant to prove that these documents were delivered until they were recorded, and, of course, the burden was on the appellant to show the date of the delivery, and failing in this then the Court was justified in following the law applicable in such cases.

Section 2957 of the Civil Code of the State of California reads as follows, to-wit:

“A mortgage of personal property or crops is void as against creditors of the mortgagor and subsequent purchasers and encumbrancers of the property in good faith for value, unless:

1. It is acknowledged, or proved or certified, in like manner as grants of real property;
2. Place of recordation. The mortgage, if of animate personal property other than crops growing or to be grown, is recorded in the office of the Recorder of the County where the mortgagor resides at the time the mortgage is executed, or in case the mortgagor is a non-resident of this state, in the office of the Recorder of the county where the property mortgaged is located at the time the mortgage is executed;

4. The mortgage, if of personal property other than crops growing or to be grown or animate personal property, is recorded in the office of the Recorder of the County where the mortgagor resides at the time the mortgage is executed, and also in the county where the property mortgaged is located, at the time the mortgage is executed, and to which such property is thereafter removed."

It can be readily seen from a reading of the foregoing paragraph of the Civil Code of the State of California that two things must be done to make a valid chattel mortgage in this State. They are:

1. The execution and delivery of the mortgage;
2. The recording thereof.

In this connection the case of *Wolpert v. Gripton*, 213 Cal. 474, 2 Pac. (2d) 767, gives us what we believe to be the key to the question. The court in this instance said, "Recordations is designed as a substitute for delivery and change of possession."

Applying this law to the question herein presented, it must be presumed that the delivery was made at the time of the recordation, and this is what the Referee found. If that was not the date of the delivery then it was incumbent upon the appellant to meet this burden by showing the date on which the chattel mortgage was actually delivered.

In this connection the Referee in his findings said [Tr. p. 17]:

"My conclusion in the matter is that the bankrupt has not met the burden imposed upon him as afore-

said. I am entirely convinced that one of two things happened, namely: (1) That the chattel mortgage here involved was not delivered by the bankrupt to Bodell until July 25th, 1939, the day it was recorded, or (2) that if it was previously delivered it was definitely agreed and understood between Averill and Bodell that it was not to be effective for any purpose or recorded or used unless or until the aforesaid Balding recovered a judgment against Averill."

There is no evidence in the record to overcome the conclusion reached by the Referee and the decision of the Referee may not be questioned unless there is no evidence to support his conclusions.

If delivery had been made prior to the date of recordation, the burden was upon the appellant to show such delivery. This he utterly failed to do.

Again the Supreme Court of the State of California in the case of *Ruggles v. Cannedy*, 127 Cal. 290, 46 L. R. A. 371, 53 Pac. 911, 59 Pac. 827, held that the recording of a chattel mortgage pursuant to Section 2957 of the Civil Code is intended to take the place of the immediate delivery and continued change in possession required in other cases on transfer by Section 3440 (Bulk Sales Act), and if the mortgage is not acknowledged or proved, certified and recorded as required by this section, it is void as to creditors of the mortgagor.

Manifestly, then, in order to make a valid chattel mortgage it must be recorded and the recording date of the chattel mortgage and mortgage in this matter was the 25th day of July, 1939, which was within one year of the time of the filing of the petition in bankruptcy.

II.

Has the Appellant Met the Burden of Proof as Required by Statute.

A reading of the record in this matter will show that the appellee made a *prima facie* showing at the hearing before the Referee, and that the Referee on this *prima facie* showing made his deductions which are amply supported by this *prima facie* showing, and, naturally, the findings of the Referee will not be disturbed on appeal unless some glaring error appears in the record. We submit that there is nothing in the record to support appellant's contention other than his argument which is certainly not evidence.

The above is supported by the decision of the Honorable Circuit Court of Appeals in the cases of *In re Patrizzo*, 105 Fed. (2d) 142; 40 A. B. R. (N. S.) 527; *In re Lozito*, 113 Fed. (2d) 764, 2 A. L. R. 1672.

As there was no evidence to the contrary, the Referee had no choice but to presume from the evidence that delivery was made at the time of the recordation of the instrument in question under the provisions of Section 2957 of the Civil Code, *supra*, the burden being upon the bankrupt to show to the contrary.

We also think that the fact that the Paradise Cafe, a corporation, filed its schedules, which were executed by Cyrus E. Averill, as president, and which included as assets the property heretofore belonging to said Averill, and by so doing the estate of Averill in the bankruptcy

lost one-half of its assets to the estate of Paradise Cafe, resulting in a continuation of this fraud during and after the time the trustees in the two estates had been appointed and were acting.

We think that the finding of fraud by the Superior Court is conclusive and *res adjudicata* so far as this question is concerned here, leaving the only question to be determined as to when the fraud was actually perpetrated, and we believe that the perpetration came within the one year period of the date of the filing of the petition.

The appellant lays great stress upon the fact that there was a lack of evidence in his opening brief, but we feel that lack of evidence, if any, must be borne by the appellant and not the appellees, for the reason that the burden shifted to the appellant by the provisions of Section 14-(c) of the Bankruptcy Act, *supra*. See also the cases *In re Patrizzo* and *In re Lizota*, *supra*.

III.

Defective Specifications Are Waived by Going to Trial on the Merits Without Objections.

The appellant dwells a great deal upon "defective specifications," but in our opinion appellant waived the right to now object to the specifications by having proceeded to trial on the merits without objection thereto.

In the case of *Osborne v. Perlins*, 112 Fed. 127, the Court said:

"Defective specifications are waived by going to trial on merits without objections."

Again in the case of *Huntley v. Snider*, 86 Fed. (2d) 539, the Court said:

"It is too late to urge objections to specifications for their too great generality for the first time on appeal."

An inspection of the record will show that the appellant made no objections to the specifications at the time of trial, and by so doing they must be deemed to have waived any defect in any that might have existed in the specifications.

IV.

Conclusion.

In conclusion it appears to us:

1. That any lack of evidence in this matter as contended by appellant must be deemed due to the failure of the appellant to meet the burden of proof as required by statutes for the reason that the findings of the Referee are amply supported by the evidence as introduced by the appellee at the hearing in the first instance, and we feel that counsel has overlooked completely the provisions of Section 14-(c) of the Bankruptcy Act, and also the cases cited in support of this contention.

2. That the record as it stands is sufficient to support the judgment of the Referee and should be sustained by this Court.

Respectfully submitted,

NAT ROSIN,

Attorney for Trustee.

DAVID C. LEVENSON and

KENNETH E. MATOT,

By KENNETH E. MATOT,

Attorneys for Floyd C. Balding.

No. 10036.

IN THE

7
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

CYRUS E. AVERILL, JR.,

Appellant,

vs.

FRANCIS F. QUITTNER, *et al.*,

Appellees.

APPELLANT'S CLOSING BRIEF.

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FILED

MAY 25 1942

PAUL D. O'BRIEN,

Parker & Baird Company, Law Printers, Los Angeles

CLERK

No. 10036.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CYRUS E. AVERILL, JR.,

Appellant,

vs.

FRANCIS F. QUITTNER, *et al.*,

Appellees.

APPELLANT'S CLOSING BRIEF.

The entire argument of the appellees' reply brief centers upon one main issue and that is the contention that the trustee and objecting creditors had established a *prima facie* case for the denial of the discharge, and that the bankrupt had then not met his burden of proof. Therefore, in this closing brief, the attention of this Honorable Court will be respectfully directed to only one major remaining issue and that is, does the transcript of record in the within proceedings indicate that the Referee had before him any facts which would justify a finding by him that the mortgage involved in the objection to the discharge was delivered by the bankrupt within the 12 months' period prior to bankruptcy?

Argument.

Upon the hearing on the objection to the discharge of the appellant the objectors introduced evidence solely to the proof that the mortgage involved was delivered on the 15th day of March, 1939, more than 12 months prior to the bankruptcy and therefore it was accepted by the bankrupt and it was not incumbent upon him to verify this date since it had been established by the objectors and had not been disproved in any other manner.

I.

At pages 4, 5, 6, 7, 8 and 9 of the Appellees' Reply Brief, continuous reference is made to the fact that no testimony was allegedly offered by the bankrupt as to when delivery was made of the documents in question and that therefore the Referee and the Court were justified in finding that the delivery was made on the date the instruments were recorded, that is to say, on July 25, 1939, within one year of the bankruptcy.

However, this argument, which appears to be the sole answer which the appellees have to the contentions presented by the appellant in the opening brief, fails to consider one obvious and undisputed factual situation. In presenting the evidence in support of their objections, the objectors incorporated the complaint, findings of fact, conclusions of law and judgment in a Superior Court action entitled *Balding versus Averill, Jr., et al.*, No. 448466. As has been pointed out in the opening brief and the reply brief, it is solely upon this judgment that the objectors' predicated their case before the Referee and

the District Court. It is their contention that these findings of fact are *res adjudicata* as to the facts involved in the Superior Court action and that therefore the bankrupt would not be entitled to show that the transfers were not fraudulent. With this contention, we have no quarrel. However, in relying upon the findings of fact, conclusions of law and judgment, to sustain their own case, the appellees must also accept the findings where the same would be favorable to the bankrupt.

(a) In Finding No. IV [Tr. p. 50] and Finding No. VII [Tr. p. 52], the trial court expressly finds that on or about the 15th day of March, 1939, the bankrupt herein did make, *deliver* and execute to the mortgagee, the mortgages involved in the State Court proceedings.

(b) In view of the absence of any testimony submitted by the objectors at the time of the hearing on the objection to the discharge and their reliance solely upon the documents in the Superior Court, it is obvious that the appellees themselves have sustained any burden of proof which might otherwise be placed upon the bankrupt. What better evidence could there be of the facts than the findings of fact upon which the appellees predicate their entire case of fraud? They cannot have their cake and eat it too, in the sense of being entitled to use the Superior Court proceedings as *res adjudicata* on the issue of fraud and at the same time refuse to recognize that this same Superior Court said that the mortgages in question were made, delivered and executed on March 15, 1939, more than 12 months prior to the commencement of the bank-

ruptcy proceedings. Until the appellees introduced the evidence to refute the factual situation which they themselves had established, the bankrupt would not only be foolish to attempt to again bring up the issue of the date of delivery, but he could not, by his testimony before the Referee, vary the findings of fact and judgment in the Superior Court which were then and are now tendered by appellees as *res adjudicata* of the factual issues involved.

Conclusion.

In the court below, the appellees had the burden of proving that the appellant had committed an act forbidden by the Bankruptcy Act within 12 months prior to his adjudication in bankruptcy. It is the contention of the appellant that there are no facts in the record which could sustain such a finding by the Referee or the District Court. The only evidence introduced definitely establishes that any acts of the appellant which might have been criticized were committed by him more than -12 months prior to the commencement of the bankruptcy proceedings.

Respectfully submitted,

MARTIN GENDEL,

Attorney for Appellant and Bankrupt.

United States
Circuit Court of Appeals

For the Ninth Circuit.

PACIFIC SOUTHWEST REALTY COMPANY,
a corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the United States
Board of Tax Appeals.

FILED

MAR - 5 1942

PAUL P. O'BRIEN,
CLERK

No. 10037

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES

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For Comm'r.:

E. A. TONJES, Esq.

Docket No, 102605

PACIFIC SOUTHWEST REALTY COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1940

May 13—Petition received and filed. Taxpayer notified. Fee paid.

“ 13—Copy of petition served on General Counsel.

“ 13—Request for Circuit hearing in Los Angeles filed by taxpayer. 5/13/40 copy served.

1940

Jun. 22—Answer filed by General Counsel.

“ 28—Copy of answer served on taxpayer. Los Angeles, California calendar.

Dec. 30—Hearing set Feb. 17, 1941 in Los Angeles, California.

1941

Feb. 20—Hearing had before Mr. Mellott on the merits. Submitted on stipulation of facts. Stipulation of facts filed at hearing. Petitioner's brief due 3/22/41—respondent's 4/21/41—reply 5/6/41.

Mar. 6—Transcript of hearing of 2/20/41 filed.

“ 20—Brief filed by taxpayer. 3/21/41 copy served.

Apr. 21—Motion for extension to May 1, 1941 to file reply brief filed by General Counsel. 4/22/41 granted.

“ 23—Reply brief filed by General Counsel.

May 5—Reply brief filed by taxpayer. 5/5/41 copy served.

Oct. 17—Notice of appearance of Stuart T. Baron as counsel filed.

“ 24—Opinion rendered, Mellott, Div. 11. Decision will be entered for the respondent. 10/27/41 copy served.

“ 27—Decision entered, Mellott, Div. 11.

Nov. 12—Motion for reconsideration and review by the entire Board, filed by taxpayer.

“ 14—Order that motion for reconsideration be denied entered.

1941

Nov. 15—Order denying review by the Board entered.

Dec. 26—Petition for review by U. S. Circuit Court of Appeals, 9th Circuit, with assignments of error filed by taxpayer.

“ 26—Proof of service filed by taxpayer.

1942

Jan. 21—Agreed statement of evidence filed.

“ 21—Agreed designation of contents of record filed. [1*]

United States Board of Tax Appeals

Docket No. 102605

PACIFIC SOUTHWEST REALTY COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:LA:EIS-90D) dated February 21, 1940, and as a basis of its proceeding alleges as follows:

*Page numbering appearing at top of page of original Reporter's Transcript.

1. The petitioner is a corporation with principal office at 215 West Sixth Street, Los Angeles, California. The returns for the periods here involved were filed with the collector for the sixth district of California.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on February 21, 1940.

3. The taxes in controversy are income taxes for the calendar years 1936 and 1937 in the amount of \$54,743.28 for the year 1936, representing a proposed deficiency of \$842.75 and a claimed overpayment in the amount of \$53,900.53, and a proposed [2] deficiency of \$13,878.81 for the year 1937.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) The Commissioner erred in determining that the sum of \$5,618.35 paid by petitioner during the year 1936 in payment of real estate taxes on property repossessed by petitioner in 1935 was a capital expenditure.

(b) The Commissioner erred in refusing to allow petitioner a deduction for said real estate taxes paid by petitioner during the year 1936 in the amount of \$5,618.35.

(c) The Commissioner erred in determining that the securities issued by petitioner and designated 6½% Cumulative Preferred Serial Stock were preferred stock. i

(d) The Commissioner erred in failing and refusing to determine that the securities issued by petitioner and designated 6½% Cumulative Preferred Serial Stock evidenced indebtedness of petitioner to the holders of said securities.

(e) The Commissioner error in determining that the securities issued by petitioner and designated 5½% Cumulative Preferred Serial Stock were preferred stock.

(f) The Commissioner erred in failing and refusing to determine that the securities issued by petitioner and designated 5½% Cumulative Preferred Serial Stock evidenced indebtedness of petitioner to the holders of said securities.

(g) The Commissioner erred in failing and refusing to allow as a deduction for interest paid during the year 1936 the sum of \$65,300.63 paid by petitioner during the year 1936 on its [3] outstanding securities designated 6½% Cumulative Preferred Serial Stock.

(h) The Commissioner erred in failing and refusing to allow as a deduction for interest paid during the year 1936 the sum of \$55,000.00 paid by petitioner during the year 1936 on its outstanding securities designated 5½% Cumulative Preferred Serial Stock.

(i) The Commissioner erred in failing and refusing to allow a deduction for the year 1936 in the amount of \$51,066.65 for the portion of the discount at which petitioner's securities designated

6½% Cumulative Preferred Serial Stock were sold which was properly allocable to the year 1936.

(j) The Commissioner erred in failing and refusing to allow a deduction for the year 1936 in the amount of \$1,833.26 for the portion of the discount at which petitioner's securities designated 5½% Cumulative Preferred Serial Stock were sold which was properly allocable to the year 1936.

(k) The Commissioner erred in failing and refusing to allow a deduction for the year 1936 in the amount of \$4,111.29 for the portion of the expense of issuance of petitioner's securities designated 6½% Cumulative Preferred Serial Stock which was properly allocable to the year 1936.

(l) The Commissioner erred in failing and refusing to allow a deduction in the amount of \$182,025.00 for the premium paid by petitioner during the year 1936 upon the redemption of its securities designated 6½% Cumulative Preferred Serial Stock.

(m) The Commissioner erred in failing and refusing to [4] allow as a deduction for interest paid during the year 1937 the sum of \$41,250.00 paid by petitioner during the year 1937 on its outstanding securities designated 5½% Cumulative Preferred Serial Stock.

(n) The Commissioner erred in failing and refusing to allow a deduction for the year 1937 in the amount of \$31,275.39 for the portion of the discount at which petitioner's securities designated

5½% Cumulative Preferred Serial Stock were sold which was properly allocable to the year 1937.

(o) The Commissioner erred in failing and refusing to allow a deduction in the amount of \$20,000.00 for the premium paid by petitioner during the year 1937 upon the redemption of its securities designated 5½% Cumulative Preferred Serial Stock.

(p) The Commissioner erred in failing to determine an overpayment for the year 1936 in the amount of \$53,900.53.

(q) The Commissioner erred in determining a deficiency in income taxes due from the petitioner for the year 1937.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) During the year 1929 petitioner sold certain real property located in the City of Los Angeles, State of California, under a conditional sales contract. Under the provisions of said contract petitioner retained title to said property until the purchase price was paid. During the year 1935, by reason of the default of the purchaser of said property, petitioner cancelled the sales contract and repossessed said property. At the time said property was repossessed by petitioner there were accrued but unpaid property taxes against said property in the amount of [5] \$5,618.35. During the year 1936 petitioner paid said property taxes in full. Petitioner deducted said sum of \$5,618.35, under the provisions of Section 23(c) of the Revenue

Act of 1936, in computing its net taxable income for the year 1936.

(b) During the years 1923, 1924 and 1925 petitioner issued and sold its securities designated as 6½% Cumulative Preferred Serial Stock of the total par value of \$4,500,000.00. The par value of each of said securities was \$100.00. Said securities were issued in twenty-three series designated "A" to "W" inclusive. Series "A" of said securities was to mature and become payable on July 1, 1929 and the remaining series were to mature and become payable successively on July 1st of each year thereafter, to and including the year 1951. Under the terms and conditions upon which said securities designated 6½% Cumulative Preferred Serial Stock were issued and sold petitioner bound itself to make payments to the holders of said securities in the amount of 6½% per annum of the par value of said securities and also bound itself to redeem said securities at the par value thereof plus accrued interest on the maturity dates specified. Upon the sale of said securities petitioner became indebted to the holders thereof in the amount of the par value thereof. The annual payments of 6½% of the par value of said securities were interest payments on indebtedness of petitioner to the holders of said securities.

(c) During the year 1928 petitioner issued and sold its securities designated 5½% Cumulative Preferred Serial Stock of the total par value of \$1,000,000.00. The par value of each of said securities was \$100.00. Said securities were issued in

twenty-two [6] series designated "AA" to "VV" inclusive. Series "AA" was to mature and become payable on July 1, 1939 and the remaining series were to mature and become payable successively on July 1st of each year thereafter to and including the year 1960. Under the terms and conditions upon which said securities designated 5½% Cumulative Preferred Serial Stock were issued and sold, petitioner bound itself to make payments to the holders of said securities in the amount of 5½% per annum of the par value of said securities and also bound itself to redeem said securities at the par value thereon plus accrued interest on the maturity dates specified. Upon the sale of said securities petitioner became indebted to the holders thereof in the amount of the par value thereof. The annual payments of 5½% of the par value of said securities were interest payments on indebtedness of petitioner to the holders of said securities.

(d) At the beginning of the year 1936 securities of petitioner designated 6½% Cumulative Preferred Serial Stock were issued, outstanding and unmatured of the total par value of \$3,766,500.00. During the year 1936 all of said securities were redeemed and retired. During the year 1936 petitioner made payments at the rate of 6½% of the par value of said securities to the holders of said securities in the total amount of \$65,300.63. Said payments in the total amount of \$65,300.63 were payments of interest on indebtedness of petitioner within the

meaning of Section 23(b) of the Revenue Act of 1936 and petitioner was entitled to deduct said sum in computing its net income for the year 1936.

(e) During the year 1936 there were issued and outstanding securities of petitioner designated 5½% Cumulative Preferred Serial [7] Stock of the par value of \$1,000,000.00. All of said securities were redeemed and retired during the year 1937. During the year 1936 petitioner made payments at the rate of 5½% of the par value of said securities to the holders thereof in the amount of \$55,000.00. During the year 1937 petitioner made payments at the rate of 5½% of the par value of said securities to the holders thereof in the amount of \$41,250.00. Said payments in the amounts of \$55,000.00 and \$41,250.00 were payments of interest on indebtedness of petitioner within the meaning of Section 23(b) of the Revenue Act of 1936 and petitioner was entitled to deduct said amounts in computing its net income for the years 1936 and 1937.

(f) Said securities designated 6½% Cumulative Preferred Serial Stock issued and sold as aforesaid were sold by petitioner at discounts from \$1.00 to \$3.50 per \$100 par value. The total discount at which said securities were issued and sold was \$121,924.00. The discount at which petitioner sold its said securities was an expense which petitioner was entitled to amortize and deduct over the life of said securities. The portion of the discount for which said securities were sold, which was allocable to the year 1936, was, to-wit, the sum of \$51,066.65.

Petitioner was entitled to deduct said sum of \$51,-066.65 in computing its net income for the year 1936.

(g) Said securities designated 5½% Cumulative Preferred Serial Stock issued and sold as aforesaid were sold by petitioner at discounts of \$3.00 and \$5.00 per \$100 par value. The total discount at which said securities were issued and sold was \$46,858.00. The discount at which petitioner sold its said securities was an expense which petitioner was entitled to amortize and deduct over [8] the life of said securities. The portion of the discount for which said securities were sold, which was allocable to the year 1936, was, to-wit, the sum of \$1,833.26. The portion of the discount for which said securities were sold, which was allocable to the year 1937, was, to-wit, the sum of \$31,275.39. Petitioner was entitled to deduct said sums of \$1,833.26 and \$31,275.39 in computing its net income for the years 1936 and 1937.

(h) In connection with the issuance and sale of petitioner's securities designated 6½% Cumulative Preferred Serial Stock, petitioner incurred necessary expenses in the total amount of \$12,-312.34. Said expenses incurred by petitioner in issuing and selling its said securities as aforesaid were deductible expenses which petitioner was entitled to amortize and deduct over the life of said securities. The portion of said expenses incurred in connection with the issuance and sale of said securities, properly allocable to the year 1936, was, to-wit,

the sum of \$4,111.29. Petitioner was entitled to deduct said sum of \$4,111.29 in computing its net income for the year 1936.

(i) During the year 1936 petitioner redeemed and retired all of its then outstanding securities designated 6½% Cumulative Preferred Serial Stock for the face value thereof plus a total premium of \$182,025.00. Petitioner was entitled to deduct said premium of \$182,025.00 in computing its net income for the year 1936.

(j) During the year 1937 petitioner redeemed and retired all of its then outstanding securities designated 5½% Cumulative Preferred Serial Stock for the face value thereof plus a total premium of \$20,000.00. Petitioner was entitled to deduct said premium of \$20,000.00 in computing its net income for the year 1937. [9]

(k) In its income tax return for the year 1936 petitioner failed to take deductions for the interest payments made on its securities designated 6½% Cumulative Preferred Serial Stock and 5½% Cumulative Preferred Serial Stock, failed to take a deduction for the portion of the expense of issuance and sale of its securities designated 6½% Cumulative Preferred Serial Stock allocable to the year 1936, failed to take deductions for the portions of the discounts at which its securities designated 6½% Cumulative Preferred Serial Stock and 5½% Cumulative Preferred Serial Stock were issued and sold which were allocable to the year 1936, and failed to take a deduction for the premium paid

upon the redemption of its securities designated 6½% Cumulative Preferred Serial Stock. As the result of petitioner's failure to take such deductions, petitioner overstated its net income for the year 1936 in the amount of \$359,336.83 and overstated its income tax liability for the year 1936 in the amount of \$53,900.53. Petitioner's correct net income for the year 1936 did not exceed the sum of \$203,403.69 and its correct income tax liability for the year 1936 did not exceed the sum of \$29,350.55. In its income tax return for the year 1936 petitioner reported a tax liability in the amount of \$83,251.08. Petitioner paid said tax in installments as follows: \$20,812.77 on or about March 15, 1937 and like amounts on or about June 12th, September 13th, and December 13, 1937.

(1) On March 6, 1940 petitioner filed with the Collector of Internal Revenue for the Sixth District of California, at Los Angeles, California, its written claim for refund of income taxes overpaid by it for the year 1936 in the amount of \$53,900.53, setting forth therein the same facts and grounds herein alleged and relied upon. A true copy of said claim for refund is hereto attached, marked [10] Exhibit B, and by this reference made a part hereof.

(m) In its income tax return for the year 1937 petitioner deducted as interest paid the payments made on its securities designated 5½% Cumulative Preferred Serial Stock in the amount of \$41,250.00, deducted the sum of \$31,275.39 as the portion of the

discount at which said securities designated 5½% Cumulative Preferred Serial Stock were issued and sold which was properly allocable to the year 1936 and deducted the premium paid in the amount of \$20,000.00 upon the redemption of said securities designated 5½% Cumulative Preferred Serial Stock. The Commissioner refused to allow said deductions and as a result thereof has proposed the deficiency for 1937 herein contested.

Wherefore, petitioner prays that this Board may hear the proceeding and determine that petitioner overpaid its income taxes for the year 1936 in the amount of \$53,900.53, that the claim for the refund of said overpayment was duly filed within the time required by law, that there is no deficiency in income taxes due from petitioner for the year 1937, and grant such other and further relief as may be proper.

CLAUDE I. PARKER
JOHN B. MILLIKEN,
BAYLEY KOHLMEIER,
Counsel for Petitioner,
808 Bank of America
Building.

Of Counsel:

L. A. LUCE,
937 Munsey Building,
Washington, D. C. [11]

State of California

County of Los Angeles—ss.

W. B. Stringfellow, being duly sworn, says that he is Vice-President of Pacific Southwest Realty Company, the petitioner above named, and duly authorized to verify the foregoing petition; that he has read the foregoing petition, or had the same read to him, and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those he believes to be true.

W. B. STRINGFELLOW.

Wood:

Subscribed and sworn to before me this 10 day of
May, 1940.

DOROTHY C. REYNOLDS,

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires June 13, 1941. [12]

EXHIBIT A

Treasury Department
Internal Revenue Service
12th Floor,
U. S. Post Office and Court House,
Los Angeles, California.

Feb. 21, 1940

Office of
Internal Revenue Agent in Charge
Los Angeles Division
IT:LA
EIS-90D

Pacific Southwest Realty Company,
215 West Sixth Street,
Los Angeles, California.

Sirs:

You are advised that the determination of your income tax liability for the taxable years 1936 and 1937 discloses a deficiency of \$14,721.56 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to Internal Revenue Agent in Charge, Los An-

geles, California, for the attention of IT:LA:FC. The signing and filing of this form will expedite the closing of your returns by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date the assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,

Commissioner,

By (Signed) GEORGE D. MARTIN,

Internal Revenue Agent in

Charge.

Enclosures:

Statement.

Form of waiver.

EIS:fpc [13]

STATEMENT

IT:LA

EIS-90D

Pacific Southwest Realty Company,

215 West Sixth Street,

Los Angeles, California.

Tax Liability for the Taxable Years Ended

December 31, 1936

and

December 31, 1937

Year	Liability	Assessed	Deficiency
Income tax 1936.....	\$ 84,093.83	\$ 83,251.08	\$ 842.75
Income tax 1937.....	73,007.00	59,128.19	13,878.81
Total.....	\$157,100.83	\$142,379.27	\$14,721.56

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated July 24, 1939; and to your protest dated August 18, 1939.

If you do not acquiesce in all of the adjustments making up the deficiency indicated, but desire to stop the accumulation of interest on that part of the deficiency resulting from adjustments to which you agree, please fill out the enclosed form of waiver, inserting therein the amount of the deficiency you desire to have assessed at once. The execution of the form for the agreed portion of the deficiency will not deprive you of your right to petition the United States Board of Tax Appeals for a redetermination of the deficiency.

A copy of this letter and statement has been mailed to your representative, Mr. Claude I. Parker, Room 808, Bank of America Building, Los Angeles, California, in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau. [14]

ADJUSTMENTS TO NET INCOME

Taxable Year Ended December 31, 1936

Net income as disclosed by return.....	\$562,740.52
Unallowable deduction:	
(a) Real estate taxes.....	5,618.35
Net income adjusted.....	<hr/> \$568,358.87

EXPLANATION OF ADJUSTMENTS

(a) Represent accrued taxes on real estate repossessed by your corporation in the year 1935. The taxes were paid by you in the year 1936 and claimed as a deduction from gross income in your 1936 return. It is held that these taxes constitute additional costs to you of the property repossessed and are not allowable deductions from gross income.

COMPUTATION OF TAX

Taxable Year Ended December 31, 1936

Income Tax:

Normal Tax:

Taxable net income.....	\$568,358.87
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Less:

Excess-profits tax	None
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Net income for normal tax computation.....	\$568,358.87
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Normal tax net income.....	\$568,358.87
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8% of \$ 2,000.00.....	\$ 160.00
------------------------	-----------

11% of 13,000.00.....	1,430.00
-----------------------	----------

13% of 25,000.00.....	3,250.00
-----------------------	----------

15% of 528,358.87.....	79,253.83
------------------------	-----------

Total normal tax.....	\$ 84,093.83
-----------------------	--------------

[15]

Surtax on Undistributed Profits:

Taxable net income.....	\$568,358.87
Less:	
Normal tax	84,093.83
Adjusted net income.....	\$484,265.04
Less:	
Dividends paid credit.....	484,265.04
Undistributed net income.....	None
Subject to tax.....	None
Surtax	None
Normal tax	\$ 84,093.83
Total income tax (normal tax and surtax).....	\$ 84,093.83
Less:	
Foreign tax credit.....	None
Balance of tax assessable.....	\$ 84,093.83
Income tax assessed (normal tax and surtax):	
Original 1937 list, account No. 402305.....	83,251.08
Deficiency of income tax.....	\$ 842.75

[16]

ADJUSTMENTS TO NET INCOME

Taxable Year Ended December 31, 1937

Net income as disclosed by return.....	\$401,921.26
Unallowable deductions:	
(a) Dividends on preferred stock.....	\$41,250.00
(b) Unamortized discount on preferred stock	31,275.39
(c) Premium on preferred stock.....	20,000.00
Net income adjusted.....	\$494,446.65

EXPLANATION OF ADJUSTMENTS

(a) Dividends paid on preferred stock do not constitute allowable deductions under the provisions of section 23 of the Revenue Act of 1936.

(b) and (c) Discount and expense incident to the issue of preferred shares and premium paid upon the retirement of said shares are not allowable deductions under section 23 of the Revenue Act of 1936. [17]

COMPUTATION OF TAX

Taxable Year Ended December 31, 1937

Income Tax:

Normal Tax:

Taxable net income.....	\$494,446.65
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Less:

Excess-profits tax	None
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Net income for normal tax computation.....	\$494,446.65
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Normal tax net income.....	\$494,446.65
----------------------------	--------------

8% of \$ 2,000.00.....	\$ 160.00
------------------------	-----------

11% of 13,000.00.....	1,430.00
-----------------------	----------

13% of 25,000.00.....	3,250.00
-----------------------	----------

15% of 454,446.65.....	68,167.00
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Total normal tax.....	\$ 73,007.00
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Surtax on Undistributed Profits:

Taxable net income.....	\$494,446.65
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Less:

Normal tax	73,007.00
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Adjusted net income.....	\$421,439.65
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Less:

Dividends paid credit.....	421,439.65
----------------------------	------------

Undistributed net income.....	None
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Subject to surtax.....	None
------------------------	------

Surtax	None
Normal tax	\$ 73,007.00
<hr/>	
Total income tax (normal tax and surtax)...	\$ 73,007.00
Less:	
Foreign tax credit.....	None
<hr/>	
Balance of tax assessable.....	\$ 73,007.00
<hr/>	
Income tax assessed (normal tax and surtax):	
Original 1938 list, account No. 401831.....	59,128.19
<hr/>	
Deficiency of income tax.....	\$ 13,878.81
<hr/>	
[19]	

EXHIBIT B

Form 843

Treasury Department
Internal Revenue Service
Revised June 1930

Claim

To Be Filed with the Collector Where
Assessment Was Made or Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

- (x) Refund of Tax Illegally Collected.
- () Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- () Abatement of Tax Assessed (not applicable to estate or income taxes).

State of California

County of Los Angeles—ss.

Name of taxpayer or purchaser of stamps, Pacific Southwest Realty Company.

Business address, 215 West Sixth Street, Los Angeles, California.

Residence.....

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed, Sixth District California.

2. Period (if for income tax, make separate form for each taxable year) from Jan. 1, 1936, to Dec. 31, 1936.

3. Character of assessment or tax, Income Tax.

4. Amount of assessment, \$83,251.08; dates of payment 3/15, 6/12, 9/13, 12/13/37.

5. Date stamps were purchased from the Government

6. Amount to be refunded or such greater amount as is legally refundable, \$53,900.53.

7. Amount to be abated (not applicable to income or estate taxes)..... \$.....

8. The time within which this claim may be legally filed expires, under Section 322 of the Revenue Code, on March 15, 1940.

The deponent verily believes that this claim should be allowed for the following reasons: [20]

Claimant corporation was incorporated on May 31, 1923 under the laws of the State of Delaware for the primary purpose of owning and operating improved real estate.

Claimant is authorized to do business in the State of California, and its principal place of business is located in Los Angeles, California.

By its Certificate of Incorporation claimant was authorized to issue and sell 50,000 shares of securities designated as 6½% Cumulative Preferred Serial stock of a par value of \$100.00 per share. It was further provided in said Certificate of Incorporation that said 6½% Cumulative Preferred Serial stock should be issued in twenty-three series designated by letters "A" to "W" inclusive, and that each series should be redeemed at par plus all unpaid, accrued and accumulated dividends thereon on the date designated. Series A was to be redeemed on July 1, 1929, and the remaining series were to be redeemed successively on July 1st of each year thereafter to and including the year 1951. It was further provided in said Certificate of Incorporation that said 6½% Cumulative Preferred Serial stocks should not be sold for less than 96% of the par value thereof; that none of said stocks should be issued except for the purpose of acquiring with the proceeds thereof property suitable for the purposes of the corporation; that the amount of said stock issued should not exceed 100% of the appraised value of the property purchased; that the

total amount of said 6½% Cumulative Preferred Serial stocks outstanding, together with the total bonded indebtedness of the corporation, should not exceed 100% of the appraised value of the property of the corporation; that if the corporation sold any of its property it should purchase other property of equal value or apply the proceeds of the sale to the redemption of its bonds or preferred stock.

It was further provided that the dividends on said 6½% Cumulative Preferred Serial stock should be 6½% per annum, and no more, payable quarterly. The dividends were cumulative and no dividends could be paid on common stock until all dividends due had been paid on said 6½% Cumulative Preferred Serial stock and until an amount equal to two full yearly dividends on the outstanding 6½% Cumulative Preferred Serial stock had been set aside or deposited with a designated trust company. Upon liquidation or dissolution no distribution could be made to the holders of the common stock until the holders of 6½% Cumulative Preferred Serial stock had received 105% of the par value of said stock. Each series of said stock matured on a definitely designated date, and it was provided that said stock should be redeemed on said maturity date at par plus unpaid, accrued and accumulated dividends thereon. In the event the corporation failed to redeem said 6½% Cumulative Preferred Serial stock on the maturity dates designated, the holders thereof were given the right to

enforce payment of the par value plus any unpaid, accrued and accumulated dividends thereon, the same as any unconditional claim or debt against the corporation. [22]

The holders of said 6½% Cumulative Preferred Serial stock were given no voting rights except that it was provided that if any dividends should not be paid on the due date and should remain unpaid for ninety (90) days, the holders of the 6½% Cumulative Preferred Serial stock should have exclusive voting power until such dividend was paid.

During the years 1923, 1924 and 1925, 45,000 shares of said 6½% Cumulative Preferred Serial stock were issued and sold by claimant corporation. The certificates issued by claimant corporation to evidence said 6½% Cumulative Preferred Serial stock contained a statement of the rights and interests of the holders thereof. A true copy of the certificates issued by claimant corporation as evidence of said 6½% Cumulative Preferred Serial stock is attached, as Exhibit "A", to the claim for refund filed by claimant for the year 1934 and is by this reference made a part hereof.

During the year 1928, pursuant to authority granted it by its Certificate of Incorporation, claimant corporation issued and sold 10,000 shares of securities designated as 5½% Cumulative Preferred Serial stock of the par value of \$100.00 per share. Except for the amount of dividends provided and the minimum amount for which it could be issued,

said 5½% Cumulative Preferred Serial stock was substantially the same and was issued upon substantially the same terms and conditions as the securities theretofore issued by claimant, designated as 6½% Cumulative Preferred Serial stock and described more fully above. Said 5½% Cumulative Preferred Serial stock was issued in twenty-two (22) series, designed "AA" to "VV" inclusive. It was provided that Series "AA" would mature and become payable on July 1, 1939, and the remaining series would mature and become payable on July 1st of each year thereafter to and including the year 1960. A true copy of the certificates issued by claimant as evidence of said 5½% Cumulative Preferred Serial stock is attached, as Exhibit "B", to the claim for refund filed by claimant for the year 1934 and is by this reference made a part hereof.

At the beginning of the year 1936 there were issued and outstanding 37,665 unmatured shares of said 6½% Cumulative Preferred Serial stock. During the year 1936 all of said 37,665 shares of said securities were redeemed. During the year 1936 there were issued and outstanding 10,000 shares of said 5½% Cumulative Preferred Serial stock. During the year 1936 claimant made payments on said securities to the holders thereof, which payments were designated dividends, in the total amount of \$120,300.63.

Claimant is informed and believes that at the time of the issuance of said securities it was the

intention and understanding of claimant and the purchasers of said securities that the purchase price paid for said securities was a loan to claimant which was to be repaid in full with interest at the designated rate.

The above stated facts show clearly that said 6½% Cumulative Preferred Serial stock and 5½% Cumulative Preferred Serial stock were issued and sold upon the same terms and conditions and contained the requisite elements of bonds or other indebtedness [23] including definite maturity dates, a definite rate of interest and an enforceable obligation to repay the principal sum together with accrued interest upon the maturity dates. In this regard, claimant refers to the following court decisions:

Arthur Jones Syndicate v. Commissioner,
(C.C.A.-7) 23 Fed (2d) 833;

Commissioner v. Proctor Shop, Inc. (C.C.A.-
9) 82 Fed (2d) 792;

Commissioner v. O.P.P. Holding Corp.,
(C.C.A.-2) 76 Fed. (2d) 11;

Helvering v. Richmond F. & P. R. Co.,
(C.C.A.-4) 90 Fed. (2d) 971;

Bolinger-Franklin Lumber Co. v. Commis-
sioner, 7 B.T.A. 402.

Claimant believes and contends that the holders of said securities designated as 6½% Cumulative Preferred Serial stock and 5½% Cumulative Preferred Serial stock were creditors of claimant cor-

poration and that the certificates representing said securities were certificates of indebtedness, and the payments made thereon by claimant were interest payments which, under the provisions of Section 23(b) of the Revenue Act of 1936, claimant was entitled to deduct in computing its net income for the year 1936 for income tax purposes.

The 45,000 shares of said 6½% Cumulative Preferred Serial stock issued and sold by claimant during the years 1923, 1924 and 1925, and the 10,000 shares of said 5½% Cumulative Preferred Serial stock issued and sold by claimant during the year 1928 were issued and sold during the years and at the discounts as shown in the following schedules:

6½% Cumulative Preferred Serial Stock

Series	Maturity Date	Total Issued	Issued during 1923		Issued During 1924	Issued During 1925
			Issued at \$1.00 Discount	Issued at \$3.00 Discount	Issued at \$3.50 Discount	Issued at \$2.50 Discount
A	7-1-29	\$ 99,000	\$ 66,000	\$	\$ 22,000	\$ 11,000
B	7-1-30	99,000	41,700	24,300	22,000	11,000
C	7-1-31	99,000	34,500	31,500	22,000	11,000
D	7-1-32	99,000	20,000	46,000	22,000	11,000
E	7-1-33	112,500	73,500	1,500	25,000	12,500
F	7-1-34	112,500	34,600	40,400	25,000	12,500
G	7-1-35	112,500	22,800	52,200	25,000	12,500
H	7-1-36	126,000	32,000	52,000	28,000	14,000
I	7-1-37	126,000	30,000	54,000	28,000	14,000
J	7-1-38	153,000	57,000	45,000	34,000	17,000
K	7-1-39	153,000	6,300	95,700	34,000	17,000
L	7-1-40	153,000	67,000	35,000	34,000	17,000
M	7-1-41	180,000	15,600	104,400	40,000	20,000
N	7-1-42	207,000	3,500	134,500	46,000	23,000
O	7-1-43	207,000	14,300	123,700	46,000	23,000
P	7-1-44	234,000	11,500	144,500	52,000	26,000
Q	7-1-45	261,000	21,900	152,100	58,000	29,000
R	7-1-46	274,500	88,000	95,000	61,000	30,500
S	7-1-47	301,500	5,000	196,000	67,000	33,500
[24]						
T	7-1-48	328,500	10,000	209,000	73,000	36,500
U	7-1-49	355,500	28,000	209,000	79,000	39,500
V	7-1-50	400,500	50,500	216,500	89,000	44,500
W	7-1-51	306,000	45,100	158,900	68,000	34,000
		\$4,500,000	\$778,800	\$2,221,200	\$1,000,000	\$500,000

Note: The values stated on the foregoing page are the par values of the certificates issued.

5½% Cumulative Preferred Serial Stock

Series	Maturity	Total (Issued during 1928)	Issued at \$3. Discount	Issued at \$5. Discount
AA	7-1-39	\$ 10,000	\$ 1,500	\$ 8,500
BB	7-1-40	10,000		10,000
CC	7-1-41	10,000	1,500	8,500
DD	7-1-42	15,000		15,000
EE	7-1-43	15,000		15,000
FF	7-1-44	15,000		15,000
GG	7-1-45	20,000		20,000
HH	7-1-46	20,000	500	19,500
II	7-1-47	20,000	2,000	18,000
JJ	7-1-48	25,000	1,000	24,000
KK	7-1-49	25,000	3,200	21,800
LL	7-1-50	25,000	4,000	21,000
MM	7-1-51	25,000	3,000	22,000
NN	7-1-52	85,000	7,000	78,000
OO	7-1-53	85,000	12,000	73,000
PP	7-1-54	85,000	6,500	78,500
QQ	7-1-55	85,000	40,000	45,000
RR	7-1-56	85,000	8,500	76,500
SS	7-1-57	85,000	13,500	71,500
TT	7-1-58	85,000	27,200	57,800
UU	7-1-59	85,000	15,500	69,500
VV	7-1-60	85,000	10,200	74,800
		<hr/> \$1,000,000	<hr/> \$157,100	<hr/> \$842,900

Note: The values stated above are the par values of the certificates issued.

Claimant contends that the discount at which it sold said securities was a cost or expense which claimant was entitled to amortize and deduct over the life of said securities; that the portion of the discount for which said 6½% Cumulative Preferred Serial stock was sold, which was allocable to the year 1936, was, to-wit, the sum of \$51,066.65; that

the portion of the discount at which the 5½% Cumulative Preferred Serial stock was sold, which was allocable to the year 1936 was, to-wit, the sum of \$1,833.26; that claimant was entitled to deduct said sum of \$51,066.65 and \$1,833.26 in computing its net income for the year 1936.

Claimant corporation incurred necessary expenses in connection with the issuance and sale of said 6½% Cumulative Preferred Serial [25] stock in the total amount of \$12,312.34.

Claimant contends that the expenses incurred by claimant in issuing and selling said securities were deductible expenses which should have been amortized and deducted over the life of said securities. The portion of said expenses incurred in connection with the issuance and sale of said 6½% Cumulative Preferred Serial stock properly allocable to the year 1936 was, to-wit, the sum of \$4,111.29.

During the year 1936 claimant redeemed and retired all of its then outstanding 6½% Cumulative Preferred Serial stock for the face value thereof, plus a total premium, of \$182,025.00. Said premium paid upon the redemption of said securities was a deductible expense for the year 1936. (Regulations 94, Article 22 (a)-18(1)).

In summary, claimant contends that in computing its net taxable income for the year 1936, for federal income tax purposes, claimant was entitled to deductions for interest paid on said 6½% Cumulative Preferred Serial stock and 5½% Cumulative Pre-

ferred Serial stock, and for discount expense and issuance expense incurred in connection with the issuance of said securities and the premium paid upon the redemption of said securities, as aforesaid, as set forth more fully in the following amounts:

Interest on 6½% Cumulative Preferred Serial stock and 5½% Cumulative Preferred Serial stock	\$120,300.63
Discount on 6½% Cumulative Preferred Serial stock allocable to the year 1936.....	51,066.65
Discount on 5½% Cumulative Preferred Serial stock allocable to the year 1936.....	1,833.26
Expense of issuance of 6½% Cumulative Preferred Serial stock allocable to the year 1936	4,111.29
Premium paid upon redemption of 6½% Cumulative Preferred Serial stock.....	182,025.00
Total	\$359,336.83

In preparing its income tax return for the year 1936 and in computing its net income for said year, claimant took no deductions for interest paid on its said securities designated 6½% Cumulative Preferred Serial stock and 5½% Cumulative Preferred Serial stock; took no deductions for the discount at which said securities were sold; took no deductions for expenses incurred by claimant in connection with the issuance and sale of said stock and took no deduction for the premium paid upon the retirement of said 6½% Cumulative Preferred Serial stock. Under the provisions of the Revenue Act of 1936, claimant was entitled to deduct all of said expenses

in computing its net taxable income and its tax liability for said year 1936.

On or about March 15, 1937 claimant duly filed its federal income tax return for the calendar year 1936 with the Collector of Internal Revenue at Los Angeles, California. Said return disclosed [26] a net income of \$562,740.52 and a tax liability of \$83,251.08. Said tax in the amount of \$83,251.08 was duly paid during the year 1937 as follows:

\$20,812.77	on or about March 15, 1937
20,812.77	on or about June 12, 1937
20,812.77	on or about Sept. 13, 1937
20,812.77	on or about Dec. 13, 1937
<hr/>	
\$83,251.08	

Claimant's correct net income for the year 1936 was \$203,403.69 and its correct income tax liability for said year was \$29,350.55. By reason of the errors set forth herein, claimant overstated its net income for the year 1936 in the amount of \$359,336.83 and overpaid its income tax liability for said year in the amount of \$53,900.53.

Claimant respectfully requests that the deductions herein claimed be allowed and the overpayment of its income tax liability for the year 1936 in the total amount of \$53,900.53 be refunded, together with interest thereon from the dates of payment thereof. Claimant also requests that it be granted a hearing on its claim.

Signed

PACIFIC SOUTHWEST
REALTY COMPANY,
By W. B. STRINGFELLOW,
Vice President.

CERTIFICATE

I hereby certify that the foregoing claim for refund was prepared by me for and on behalf of taxpayer; that the facts recited therein are the facts as given to me by the taxpayer and to the best of my knowledge and belief are true and correct.

BAYLEY KOHLMEIER,

With Claude I. Parker

808 Bank of America Bldg.,

Los Angeles, California.

Sworn to and subscribed before me this 5th day of March, 1940 (Wood)

DOROTHY C. REYNOLDS,

Notary Public.

(See Instructions on Reverse Side)

[Reverse Not Filled In]

[Endorsed]: U. S. B. T. A. Filed May 13, 1940.

[27]

[Title of Board and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits that the taxes in controversy are income taxes for the calendar years 1936 and 1937, and denies the remainder of the allegations contained in paragraph 3 of the petition.

4. Denies the allegations of error contained in subdivisions (a) to (q), inclusive, of paragraph 4 of the petition.

5. Denies the allegations of fact contained in subdivisions (a) to (m), inclusive, of paragraph 5 of the petition.

6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

Signed J. P. WENCHEL,
 Chief Counsel,
 Bureau of Internal Revenue.

Of Counsel:

ALVA C. BAIRD,
FRANK T. HORNER,
E. A. TONJES,
Special Attorneys,
Bureau of Internal Revenue.

EAT/q 6-13-40.

[Endorsed]: U. S. B. T. A. Filed June 22, 1940.

[28]

[Title of Board and Cause.]

Docket No. 102605.

Promulgated October 24, 1941.

1. In conformity with its articles of incorporation petitioner issued and sold two series of "Cumulative Preferred Serial Stock." The certificates stated that they were redeemable at par, plus all unpaid, accrued, or accumulated dividends, and that the holders should have the right to enforce payment the same as on any unconditional claim or debt against the corporation. The articles also authorized the corporation to issue bonds, though the total indebtedness of the corporation could not exceed 50 percent of the appraised value of the property subject thereto. First mortgage bonds in an amount substantially equivalent to the face amount of the preferred stock were issued and sold at about the same time that the stock was issued. The stock was represented to be free from the personal property tax of the state and free from the normal Federal income tax. The periodic payments were made from profits, were denominated "dividends" and no payments were ever made except following the declaration of a dividend. Held, that the certificates were what they purported to be and not merely evidence of the relation of debtor and creditor; held, further, that the amounts paid as "dividends" may not be deducted as "interest" nor may the dis-

counts allowed or the premiums paid in connection with the sale and redemption of the stock in the taxable years be allowed as deductions from gross income.

2. Real estate sold by petitioner in 1929 under a conditional sales contract was repossessed in 1935, following default by the purchaser in the payment of the purchase price. Held, payment by petitioner in 1936 of the real estate taxes which had been assessed in 1935, prior to the repossession, does not entitle it to a deduction for taxes paid.

Bayley Kohlmeier, Esq., and Stuart Baron, Esq., for the petitioner. E. A. Tonjes, Esq., for the respondent.

OPINION.

Mellott: The Commissioner determined deficiencies in income tax for the calendar years 1936 and 1937 in the respective amounts of \$842.75 and \$13,878.81. The petition alleges that there is no deficiency [29] for either year and that petitioner overpaid its income taxes for the year 1936 in the amount of \$53,900.53. The two general questions are: (1) Whether securities issued by petitioner and designated either 6½% or 5½% cumulative preferred serial stock represented an indebtedness rather than a proprietary interest in the corporation; and (2) whether an amount paid by petitioner is deductible as taxes.

The proceeding was submitted upon a stipulation of facts with attached exhibits and the testimony of three witnesses. We find the facts to be as stipulated and, from the testimony of the witnesses, find that the two classes of preferred stock issued by petitioner as hereinafter set out were not listed upon any stock exchange but were dealt in, in "over-the-counter" transactions, in which accrued dividends, prior to the actual declaration of a dividend, were generally taken into consideration in substantially the same manner and to the same extent as accrued interest upon bonds is usually taken into consideration upon purchase or sale. All other facts hereinafter set out are taken from the stipulation of the parties.

Petitioner is a corporation organized in 1923 under the laws of Delaware and is qualified to do business in the State of California. Its principal place of business is in Los Angeles, California, and its income tax returns for the taxable years were filed with the collector of internal revenue for the sixth district of California. Its books of account were kept and its returns of income were made on the cash basis.

Petitioner was incorporated by persons affiliated with the Pacific Southwest Trust & Savings Bank and the First National Bank of Los Angeles for the purpose of acquiring, and thereafter owning and operating, all of the real estate properties owned by the first mentioned bank and one parcel

of real estate owned by the second mentioned bank, and for the further purpose of providing additional bank premises as the growth of the banks required. The principal reason for organizing petitioner was to avoid "the locking up of too great a proportion" of the capital and surplus of the banks in real estate owned by them.

The total authorized capital stock of the corporation was 100,000 shares, divided into 50,000 shares of preferred of the par value of \$100 each and 50,000 shares of common with no nominal or par value. The original articles of incorporation provided for the issuance of 23 series of 6½ percent cumulative preferred serial stock, to be designated by the letters A to W, both inclusive, each series to be for the number of shares shown (ranging between 1,100 and 3,950) and to be "redeemable at their par value plus all unpaid, accrued, or accumulated dividends thereon." Such cumulative preferred serial stock could be issued as and when the board of directors should determine, [30] but it could not be issued except for the purpose of acquiring property suitable for one or more of the purposes of the corporation. The articles of incorporation also provided:

* * * The aggregate indebtedness of the corporation secured by mortgage, deed of trust, or otherwise, shall not exceed in amount Fifty per cent (50%) of the appraised value of the property subject thereto. The total amount of preferred stock of the corporation at any time

outstanding shall not, together with the total bonded indebtedness of the corporation, exceed One Hundred per cent (100%) of the appraised value of the property of the corporation * * *.

The 6½ percent cumulative preferred serial stock was "entitled to receive in each year out of the surplus or net profits of the business of the corporation, dividends at the rate of 6½% per annum, and no more, upon the par value of said stock from date of issue, payable quarterly * * *." The dividends were cumulative and "if in any year or years the dividends * * * shall not have been paid, such dividends shall be paid in full before any dividends shall be paid or set apart upon the common stock. The amount of any serial redemption of said preferred stock, if overdue, shall be paid before any dividends shall be paid or set apart on the common stock."

In the event of liquidation, dissolution, or winding up of the corporation, the holders of the preferred stock were entitled, before any distribution could be made to the holders of the common stock, "to be paid out of the surplus profits * * *, or in case such profits shall be insufficient, then from the general assets of this corporation, an amount equal to 105% of the par value of said stock." Upon the maturity date specified in each series the shares were to "be redeemed at par, plus unpaid, accrued, and accumulated dividends thereon * * *." In the event the corporation should fail to redeem the stock

at such time and place, the holders were to "have the right to enforce payment of the par value of said stock so agreed to be redeemed, together with the amount of any unpaid, accrued, or accumulated dividends thereon, the same as on any unconditional claim or debt against the corporation * * *." The preferred stock was to have no voting power, the sole voting rights being vested in the holders of the common stock. In the event that any dividend on the preferred stock should not be paid when payable and should remain unpaid for ninety days, then so long as such dividend or any part thereof should remain unpaid, the issued and outstanding preferred stock was to be exclusively entitled to the voting power.

All of the common stock of petitioner, except directors' qualifying shares, was issued to the First Securities Co., an affiliate of petitioner. All of the stock of First Securities Co. and all of the stock of the two banks above named was owned by the Los Angeles Trust & Safe Deposit Co. as trustee in trust for the benefit of the owners of beneficial [31] certificates issued by the trustee. All of the stock of the trustee was likewise owned by the First Securities Co.

Pursuant to the original articles of incorporation during the years 1923, 1924, and 1925 petitioner issued and sold 6½ percent cumulative preferred serial stock of the total par value of \$4,500,000 in 23 series designated A to W, inclusive. Series A

matured and became payable on July 1, 1929, and one of the remaining series matured and became payable on July 1 of each year thereafter to and including the year 1951. The certificates were redeemable at par "plus all unpaid, accrued, or accumulated dividends thereon", and entitled the owners "to receive in each year out of the surplus or net profits of the business of the corporation, dividends at the rate of $6\frac{1}{2}\%$ per annum, and no more, upon the par value of said stock from date of issue * * *." The certificates also contained the essence of article fourth of the original articles of incorporation, including the provisions quoted above. During the years 1924 and 1925 petitioner also issued and sold its $5\frac{1}{2}$ percent coupon bonds of a total face value of \$3,000,000. The proceeds derived from the sale of the preferred stock and bonds were used for the purchase of real estate suitable for the purposes of the corporation.

In connection with the issuance and sale of petitioner's $6\frac{1}{2}$ percent cumulative preferred serial stock in 1923 a prospectus was published by the First Securities Co. Therein it was stated that petitioner proposed to issue at that time \$3,000,000 of $5\frac{1}{2}$ percent first mortgage bonds and \$3,000,000 $6\frac{1}{2}$ percent cumulative preferred stock and to hold in its treasury the balance of the authorized preferred stock for issuance from time to time as the needs of the company should require. The prospectus also stated: "it is the intention of the Realty Company (petitioner) to finance its present needs

by equal amounts of Preferred Stock and Bonds * * *. The annual maturities of bonds and stocks will serve to increase the original equity as the different series mature and are retired", and "The 6½% Cumulative Preferred Serial Stock is, in opinion of counsel, free from the Personal Property Tax in California and likewise free from the Normal Federal Income Tax."

Series A of the 6½ percent cumulative preferred serial stock matured and was redeemed on July 1, 1929. Series B to G, inclusive, matured and were redeemed respectively on July 1 of each year thereafter to and including 1935. At the beginning of the year 1936 6½ percent cumulative preferred serial stock of a total par value of \$3,766,500 was issued, outstanding, and unmatured. During the year 1936 all of said securities were redeemed and retired. During the year 1936 petitioner made payments to holders of said 6½ [32] percent cumulative preferred serial stock at the rate of 6½ percent per annum of the par value thereof, or \$65,300.63 as provided in the certificates.

At the time the securities referred to above were issued petitioner had a lease agreement with the Pacific Southwest Trust & Savings Bank under which the bank had obligated itself to pay as rental a sum which, with the other income of petitioner, would be sufficient to pay all of petitioner's operating expenses and in addition all interest, dividend, and amortization charges on its outstanding bonds and

preferred stock. The bank, as lessee, agreed to pay petitioner \$420,000 per annum for said property, the term of the lease being 30 years from and after July 1, 1923.

On December 16, 1927, petitioner's articles of incorporation were amended. A copy of article fourth as amended is attached to the stipulation of facts. There were no substantial changes made with respect to preferences, privileges, and other rights of the holders of preferred stock, but the amended article provided for a total authorized capital stock of 125,000 shares, divided into 75,000 shares of preferred stock of the par value of \$100 each and 50,000 shares of common stock having no nominal or par value. During the year 1928, pursuant to the authority contained in the article as amended, petitioner issued and sold its securities designated 5½ percent cumulative preferred serial stock of the total par value of \$1,000,000. The proceeds derived therefrom were used for the purchase of real estate suitable for the purposes of the corporation. The certificates were issued in 22 series designated AA to VV, inclusive, payable on July 1, 1939, and successively thereafter on July 1 of each year to and including the year 1960. Each certificate recited that on April 20, 1928, the board of directors "determined upon the issuance of \$1,000,000 (10,000 shares) fixed dividend rate, 5½%, fixed redemption premium, 2% (\$102.00 per share), designations and maturities as follows: (Schedule)."

The prospectus issued in connection with the 5½ percent cumulative preferred serial stock stated:

With the completion of the present stock sale, the Pacific Southwest Realty Company will have outstanding \$4,500,000 6½% Cumulative Preferred Serial Stock, and \$1,000,000 5½% Cumulative Preferred Serial Stock, in addition to 50,000 shares Common Stock of no par value, owned by the First Securities Company.

With the completion of the present financing on or about July 2, 1928, there will be outstanding \$5,100,000 of first mortgage bonds. The aggregate total par value of outstanding preferred stocks and bonds will then be \$10,600,000.

The prospectus also stated that the stock being offered was, "in opinion of counsel, free from the Personal Property Tax in California and likewise free from the Normal Federal Income Tax." [33]

During the year 1936 all of the 5½ percent cumulative preferred serial shares of the par value of \$1,000,000 were outstanding. All of them were redeemed and retired during the year 1937. During the years 1936 and 1937 petitioner made payments to the holders of said securities as provided in the certificates at the rate of 5½ percent of the par value thereof or \$55,000 during the year 1936 and \$41,250 during the year 1937.

The payments made by petitioner to the holders of its 6½ percent cumulative preferred serial stock

and 5½ percent cumulative preferred serial stock were authorized by resolutions of the board of directors of petitioner. A true copy of one of the resolutions is attached to the stipulation. It declares a "regular quarterly dividend of \$1.37½ a share on the 5½% Cumulative Preferred Serial Stock of this corporation, amounting to \$13,750 * * * out of the earned surplus of the corporation" and directs "that the amount thereof be set aside and transferred to 'Dividend Declared' account."

The 5½ percent cumulative preferred serial stock had been sold by the petitioner at discounts of \$3 and \$5 per \$100 par value, the discount aggregating \$46,858. It is stipulated that if the discount at which said securities were sold was a deductible expense, it was an expense which it was proper to amortize and deduct over the life of the securities and \$1,833.26 of said discount expense was properly allocable to the year 1936 and \$31,275.39 was properly allocable to the year 1937.

During the year 1936 petitioner redeemed and retired all of its then outstanding 6½ percent cumulative preferred serial stock for the face value thereof (\$3,766,500) plus a total premium of \$182,025. During the year 1937 it redeemed and retired all of its then outstanding 5½ percent cumulative preferred serial stock for the face value thereof (\$1,000,000) plus a total premium of \$20,000.

During the year 1929 petitioner sold certain real property located in the city of Los Angeles, California, under a conditional sales contract. Under

the provisions of the contract petitioner retained title to the property until the purchase price was paid. On November 15, 1935, by reason of the default of the purchaser of the property, petitioner canceled the sales contract and repossessed the property. At the time the property was repossessed by petitioner there were assessed but unpaid property taxes against it in the amount of \$5,618.35. These taxes were payable one-half on or before December 5, 1935, and one-half on or before April 20, 1936. During the year 1936 petitioner paid said property taxes in full. Petitioner deducted said sum of \$5,618.35, under the provisions of section 23 (c) of the Revenue Act of 1936, in computing its net taxable income for the year 1936. [34]

In its income tax return for the year 1936 petitioner failed to take deductions for the payments made on its securities designated 6½ percent cumulative preferred serial stock and 5½ percent cumulative preferred serial stock, failed to take deduction for the portion of the discounts at which its securities designated 5½ percent cumulative preferred serial stock were issued and sold which was allocable to the year 1936, and failed to take a deduction for the premium paid upon the redemption of its securities designated 6½ percent cumulative preferred serial stock. In its income tax return for the year 1936 petitioner reported net taxable income in the amount of \$562,740.52 and a tax liability in the amount of \$83,251.08. Petitioner paid this tax

in installments as follows: \$20,812.77 on March 15, 1937, and like amounts on June 12, September 13, and December 13, 1937. Petitioner's return for the year 1936 was filed on March 15, 1937.

Upon examination of petitioner's income tax return for the year 1936 the Commissioner disallowed the deduction taken by petitioner for real estate taxes in the amount of \$5,618.35 and determined the net income of petitioner for the year 1936 to be \$568,358.87. The deficiency for the year 1936 in the amount of \$842.75 resulted from the disallowance of said deduction and the consequent increase in petitioner's net income. In redetermining petitioner's net income for the year 1936 the Commissioner did not allow any deductions for the payments made by petitioner during said year on its securities designated 6½ percent cumulative preferred serial stock and 5½ percent cumulative preferred serial stock, did not allow a deduction for any portion of the discount at which petitioner's securities designated 5½ percent cumulative preferred serial stock were issued, and did not allow a deduction for the premiums paid by petitioner upon the redemption of its securities designated 6½ percent cumulative preferred serial stock.

On March 6, 1940, petitioner filed with the collector of internal revenue for the sixth district of California, at Los Angeles, California, its written claim for refund of income taxes overpaid by it for the year 1936 in the amount of \$53,900.53, setting forth therein the same facts and grounds here-

in alleged and relied upon. A true copy of said claim for refund is attached to the petition herein.

In its income tax return for the year 1937 petitioner deducted as interest paid the payments made on its securities designated 5½ percent cumulative preferred serial stock in the amount of \$41,250, deducted the sum of \$31,275.39 as the portion of the discount at which said securities were issued and sold which was properly allocable to the year 1937, and deducted the premium paid in the amount of \$20,000 upon the redemption of the securities. The Commissioner refused to allow these deductions. [35]

On May 22, 1940, petitioner paid to the collector of internal revenue for the sixth district of California the deficiencies in income taxes proposed to be assessed against it for the years 1936 and 1937. The payments were as follows: \$842.75 tax and \$161.09 interest, or a total payment of \$1,003.84 for the year 1936, and \$13,878.81 tax and \$1,820.21 interest, or a total payment of \$15,699.02 for the year 1937.

Petitioner contends that the securities designated 6½ percent or 5½ percent "Cumulative Preferred Serial Stock" were not what they purported to be—evidence of a proprietary interest in the corporation—but that collectively they represented an obligation of the corporation to make repayment to the holders and in the meantime to pay them interest. It therefore argues that it is entitled to deduct, as interest, the amounts paid under and pursuant to the corporate resolutions as dividends. It

also contends that it is entitled to deduct the portion of the discount properly allocable to the year 1936 and the premium paid during each of the years in connection with the redemption of the two classes of stock. Inasmuch as the latter deductions are proper if the securities were in fact obligations and the amount paid was interest (art. 22 (a)-18, Regulations 94), the three contentions may be considered together.

Numerous cases have been decided by the courts or this Board involving the same general question. None of them attempt to lay down any "comprehensive rule by which the question presented may be decided in all cases, and 'the decision in each case turns upon the facts of that case'." *Proctor Shop, Inc.*, 30 B. T. A. 721, 725, and cases cited. "If it be shown that dividends paid are, according to the intent of the parties, in fact interest, and the stock on which the dividends are paid is merely held by the creditor as security, it makes no difference what the reason was for paying in that form. The courts look to the real character of the payment * * *." *Wiggin Terminals, Inc. v. United States*, 36 Fed. (2d) 893, 898, quoted with approval by the Circuit Court of Appeals for the Ninth Circuit in affirming the decision of the Board in *Proctor Shop, Inc.*, *supra*; 82 Fed. (2d) 792. Cf. *Bolinger-Franklin Lumber Co.*, 7 B. T. A. 402; *Commissioner v. O. P. P. Holding Corporation*, 76 Fed. (2d) 11, affirming *O. P. P. Holding Corporation*,

30 B. T. A. 337; *Jewel Tea Co. v. United States*, 90 Fed. (2d) 451; *Helvering v. Richmond, F. & P. R. Co.*, 90 Fed. (2d) 971, affirming *Richmond, Fredericksburg Potomac Railroad Co.*, 33 B. T. A. 895; *Brush-Moore Newspapers, Inc.*, 37 B. T. A. 787; *Commissioner v. Palmer, Stacy-Merrill, Inc.*, 111 Fed. (2d) 809, affirming *Palmer, Stacy-Merrill, Inc.*, 37 B. T. A. 530; and *Commissioner v. Schmoll Fils Associated, Inc.*, 110 Fed. (2d) 611, reversing *Schmoll Fils Associated, Inc.*, 39 B. T. A. 411. [36]

It is true, as petitioner points out upon brief, that the cited cases establish some general principles—the name given by the parties to a particular security or to the payments made thereunder is not conclusively determinative; the true nature and character are to be determined not only from the terms and conditions of the security, but also from a consideration of all the facts and circumstances surrounding its issuance, including evidence aliunde the contract; and in every case the basic difference between the relationship of corporation and stockholder on the one hand and debtor and creditor on the other must always be kept in mind. We therefore examine the evidence and the stipulated facts in the light of these principles.

The only evidence aliunde the contract in the instant proceeding is that upon which we have based our finding to the effect that generally, in the purchase and sale of the certificates, dividends, though not declared, were taken into consideration in sub-

stantially the same manner and to substantially the same extent as accrued interest upon bonds is usually taken into consideration upon purchase and sale. There was no evidence, as in *Proctor Shop, Inc.*, and some of the other cited cases, indicating either that the issuing company desired to borrow money or that the holders were unwilling "to stand in the relation of a stockholder to the corporation." The facts show quite the contrary. The letter sent to prospective purchasers of the preferred stock, inviting them to subscribe for it, advised that the company proposed to finance its "present needs through the issuance of approximately equal amounts of preferred stock and bonds." The enclosed prospectus contained the same general statement, each indicating that the initial capital was to be obtained by borrowing 50 percent of the necessary amount through the issuance of bonds, while the remainder was to be obtained through the sale of preferred stock. This plan was carried out and \$3,000,000 of each was issued and sold. Both were later increased, so that prior to April 1, 1928, the company—in the language of its second prospectus—"had * * * sold for cash to institutions and investors an aggregate of \$5,000,000 First Mortgage 5½% Bonds and \$4,500,000 6½% Cumulative Preferred Serial Stock." At that time \$985,000 of its bonds had been retired. Then it was that the company decided to amend its articles of incorporation to permit it to issue \$1,000,000 5½ percent cu-

mulative preferred serial stock so that "with the completion of the present stock sale" there would be, as there ultimately were, \$5,500,000 outstanding cumulative preferred serial stock and \$5,100,000 of first mortgage bonds.

The facts referred to above indicate that petitioner intended the holders of the certificates to become, and to be, stockholders rather than creditors. It is apparent from the articles that petitioner never [37] intended to "borrow" more than 50 per cent of its funds. Thus it is stated: "The aggregate indebtedness of the corporation secured by mortgage, deed of trust, or otherwise, shall not exceed in amount Fifty per cent (50%) of the appraised value of the property subject thereto. The total amount of preferred stock of the corporation at any time outstanding shall not, together with the total bonded indebtedness of the corporation, exceed One Hundred per cent (100%) of the appraised value of the property of the corporation." If the preferred stock be held to be indebtedness, "secured by mortgage, deed of trust *or otherwise*",* and unless the appraised value of the property was greatly in excess of its actual cost, which we hesitate to assume, then this provision of petitioner's charter was violated; for while the aggregate of the admitted bonds, plus the "so-called" preferred stock was \$10,600,000, "the aggregate cost of the Company's properties including those heretofore owned with those now being purchased, and including the new buildings

*Italics appear in original.

which have been erected, (according to the prospectus) will be in excess of \$11,200,000."

Moreover, there are several other circumstances which collectively convince us that both the issuing corporation and those who ultimately became holders of the securities intended that the relationship between them was to be that of corporation and stockholder rather than debtor and creditor. Each prospectus contained in its heading, in bold type, "In opinion of counsel, exempt from Normal Federal Income Tax," and a more detailed statement to the same effect in the body of the document. No evidence was introduced to show whether the holders of the securities so treated the income derived from the securities—i.e., as dividends and subject only to surtax (see for example section 25, Revenue Act of 1928)—but it may be assumed, in the absence of any proof to the contrary, that they relied upon the statements contained in the prospectuses. In any event it is not wholly without significance that petitioner treated the payments as dividends upon its books and in all of its returns of income prior to 1937. Manifestly the representation that the income was "free from Normal Federal Income Tax" would be true only if the securities were preferred stock. In determining whether they were, or were not, what they purport to be, we must look, not only to the language of the certificates, but to the articles and amended articles of incorporation. They specify, in considerable detail, not only that preferred stock be issued, but also require that "Be-

fore the issuance of any such stock, the President of the Corporation shall file a certificate in the office of the corporation setting forth in detail the property purchased or to be purchased with the proceeds of the sale of such stock." The stock so issued was to "be entitled to receive in each year out of the surplus or net profits [38] of the business of the corporation, dividends at the fixed dividend rate" specified in the certificates. If in any year "the dividends" on such stock have not been paid "such dividends shall be paid in full before any dividends shall be paid or set apart upon the common stock." The use of the word "dividends" many times in the articles of incorporation and the requirement that payment of such be made "out of the surplus or net profits" can not be ignored. Wholly absent from the articles is any requirement that the annual payments upon the certificates be made regardless of earnings, except for the provisions which we shall now discuss and upon which petitioner places its chief reliance.

Each series was to "be redeemed at par, plus unpaid, accrued, and accumulated dividends thereon." "In the event that the corporation shall fail to redeem * * * at such time and place, the holders thereof shall have the right to enforce payment of the par value of said stock so agreed to be redeemed, together with the amount of any unpaid, accrued, or accumulated dividends thereon, the same as on any unconditional claim or debt against the corporation * * *." "In the event of any liquidation, disso-

lution, or winding up of the corporation, * * * the holders * * * shall be entitled, before any distribution shall be made to the holders of the common stock, to be paid out of the surplus profits arising from the business of this corporation, and then remaining intact, or in case such profits shall be insufficient, then from the general assets of this corporation, an amount equal to 105% of the par value of said stock." These provisions, petitioner contends, make the securities an "indebtedness." Respondent denies that they have any such effect, points out that the right to enforce the payment as an unconditional claim or debt appears to be limited to the holders of any series then in default, which, so far as this record shows, never occurred, and argues that "the interest of any person in the assets of a corporation must necessarily be either as a creditor or as a proprietor", but can not be both at the same time.

In practically every case decided by the courts or this Board it has been pointed out that each case must be decided on its own particular facts. *Dayton & Michigan Railroad Co.*, 40 B. T. A. 857; *Trianon Hotel Co.*, 44 B. T. A. 1073. "The authorities afford us no very certain guide in solving the difficult problem before us, but vary with the particular facts of each case." *Commissioner v. Schmoll Fils Associated, Inc.*, *supra*. Many facts and circumstances in the instant proceeding indicate that the corporation and the purchasers of the securities intended that

the relation should be proprietary rather than that of a creditor and debtor. Some of the significant facts and circumstances upon which we have relied in reaching our conclusion have [39] already been referred to. Others are: The name given to the securities by petitioner in its articles of incorporation, in its letters and prospectuses, and in the securities themselves. While the name given is not determinative, it should not lightly "be assumed that the parties have given an erroneous name to their transaction." *Schmoll Fils Associated, Inc.*, supra; *I. Unterberg & Co.*, 2 B. T. A. 274; *Kentucky River Coal Corporation*, 3 B. T. A. 644; *H. R. DeMilt Co.*, 7 B. T. A. 7. There is no evidence in the record indicating that either petitioner or the holders prior to the taxable years ever contended that there was any misnomer. Nor should it be overlooked that the certificates specifically referred to the holders as "stockholders" and to the payments as "dividends", that no payments were ever made except following the declaration of a dividend, and that all payments were made from profits. The dividends, after declaration, were set aside and transferred to "dividend declared" account.

Meridian & Thirteenth Realty Co., 44 B. T. A. 865, decided since briefs were filed in the instant proceeding lends some support to petitioner's contention. It was there held that a security designated preferred stock, having a fixed maturity

date, and requiring the payment of the agreed 6 percent regardless of profits represented an indebtedness. The proceedings are distinguishable in that in the cited case there was no evidence that any bonds had been issued by the corporation or that it had any other outstanding evidence of debt; a conclusion that the securities were in fact obligations did not require a holding that the corporation had violated its articles of incorporation; no representations were made that the securities were free from the normal Federal income tax; the company had not represented in connection with the issuance of such stock that it proposed to finance its needs through the issuance of equal amounts of preferred stock and bonds; and the issuing company had not, as in the instant proceeding, given the holders of the preferred stock a right to vote in the event of default in the payment of dividends, though withholding from the bondholders such privilege. Moreover, we think it is quite doubtful, in spite of the provision contained in the articles of incorporation and in the certificates purporting to give the holders of the preferred stock rights which they might enforce as creditors, that any such rights could be enforced under the stipulated facts to the detriment of general creditors or bondholders.

We are of the opinion and hold that the securities were what they purported to be. Compare *Brown-Rogers-Dixson Co. v. Commissioner* (C. C.

A., 4th Cir.), — Fed. (2d) — (Aug. 26, 1941). It follows that the respondent committed no error in denying the claimed deductions for interest, discount, and premiums. [40]

The petitioner's next contention is that it is entitled to a deduction of \$5,618.35, for real estate taxes paid by it in 1936. The amount in question was assessed on May 1, 1935, when the real estate was in the possession of petitioner's vendee under the conditional sales contract. Petitioner repossessed the property on November 15, 1935, the vendee having defaulted in the payment of the purchase price. The taxes were payable one-half on or before December 5, 1935, and one-half on or before April 20, 1936. Petitioner paid the entire amount during 1936 and in its income tax return for that year claimed a deduction in that amount as "taxes." Respondent disallowed the deduction on the ground that the amount paid constituted additional cost of the property repossessed.

The petitioner contends that it was the legal owner of the property and, as such, legally responsible for the payment of the taxes at the time of assessment. It argues, therefore, that it should be allowed the deduction since the amount represented taxes paid after, but which accrued before, repossession of the property. In support of its contention it cites and relies upon two unreported memorandum decisions of this Board wherein less-

ors of property were allowed to deduct taxes assessed during the time repossessed property was in the possession of the lessees. The conclusion that a lessor may deduct the taxes paid by him upon his property, notwithstanding the fact that a lessee may have covenanted to pay them as part of the consideration for the occupancy of the property, is not particularly helpful in determining the question now before us.

Respondent concedes that petitioner retained the legal title to the property which it sold in 1929. He takes the position, however, that it was a bare, naked legal title; that the equitable title was in the purchaser from the time of the sale in 1929; that it remained in him until the property was repossessed by the petitioner in November 1935; and that petitioner, having sold the property, had no alternative except to give the purchaser legal title upon payment of the agreed purchase price. He therefore contends that petitioner was holding the legal title to the property more in the nature of a trustee for the benefit of the purchaser than as an owner of the property as that term is ordinarily understood. He insists that, inasmuch as the taxes in question were assessed and became a lien against the property in March 1935, petitioner was paying an obligation, or an accrued liability, of its vendee when it, in 1936, paid the 1935 real estate taxes.

The parties have stipulated that the property was sold by petitioner during 1929 under a condi-

tional sales contract. The contract was not introduced in evidence. A "conditional sale" has been defined to be a contract for the sale of property under which possession is delivered [41] to the buyer, but title is retained in the seller until the performance of some condition, usually the payment of the purchase price. 55 C. J. 1192. The rights of the vendor and vendee under such a contract have been discussed by the courts of California in a number of cases. In *Oaks v. Kendall*, 73 Pac. (2d) 1255; 23 Cal. App. (2d) 715, the court pointed out that the vendor under such a contract retains an absolute right to hold the property as security for the payment of the purchase money according to the express terms of the contract, and quoted with approval the following excerpt from 25 California Jurisprudence, p. 762, sec. 930:

* * * In the ordinary executory contract for the sale of real property the vendor retains title as security for the payment of the purchase money and as trustee for the purchaser, who has only an equitable estate in the land. The position of the vendor is similar in some respects to that of a mortgagee. He has no greater rights than he would possess if he had conveyed the land and taken back a mortgage for unpaid purchase money, or than is held by a mortgagee who takes for his security a conveyance absolute in form instead

of a formal mortgage, except that he is not restricted to a remedy by foreclosure. A vendor is frequently said to have a lien on the property so long as he retains title, though properly speaking he has no lien, nor any need of one, since he has the complete legal title which he holds as a pledge for payment of the purchase money.

In *San Diego County ex rel. Whelan v. Davis*, 33 Pac. (2d) 827, involving the question of liability for property tax on an automobile, the Supreme Court of California, *per curiam*, said:

The tax must be levied on the owner of the property, but this does not necessarily mean the holder of the legal title. In a conditional sale, the title in the seller is for security only, to assure the payment of the purchase price. It carries with it none of the ordinary incidents of ownership. The buyer has the possession and use of the property to the complete exclusion of the seller subject only to the seller's remedies in case of default. Both in a practical and a legal sense the buyer is the beneficial owner.

In *Thompson on Real Property*, vol. 5, sec. 4526, the author states: "There can be no sensible distinction between the case of a legal title conveyed to secure the payment of a debt and a legal title retained to secure payment." While there are some

points of difference between the relation of vendor and vendee under a conditional sales contract and that of equitable mortgagee and mortgagor where the vendee holds an equity which is subject to foreclosure by the vendor, we do not think the difference is of such a substantial nature as to warrant the allowance of a deduction for taxes when paid by the vendor after the property is repossessed although such allowance would not be granted following foreclosure of the mortgage by the equitable mortgagee.

Under the laws of California, the liability for county and city taxes is determined by the ownership of property on the first Monday [42] in March. *California Sanitary Co., Ltd.*, 32 B. T. A. 122; *Crown Zellerbach Corporation*, 43 B. T. A. 541 (on appeal C. C. A., 9th Cir.). (Sec. 3628, Political Code of California.) Petitioner's vendee was the beneficial owner and had possession and control of the property on that date, and thus became liable for the payment of the real estate taxes here involved. Petitioner's payment of such taxes in 1936, after it had repossessed the property in November of 1935, does not in our opinion make such taxes its taxes or entitle it to the claimed deduction. Cf. *Commissioner v. Coward*, 110 Fed. (2d) 725; *Lifson v. Commissioner*, 98 Fed. (2d) 508; certiorari denied, 305 U. S. 662; *Estate of Lucy S. Shieffelin*, 4 B. T. A. 137; *Helvering v. Missouri State Life Insurance Co.*, 78 Fed. (2d) 778; *John Hancock Mutual Life Insurance Co.*, 10 B. T. A. 736.

Finding no error in the deficiencies determined by the respondent they must be approved. It follows that petitioner's claim for overpayment can not be allowed.

Decision will be entered for the respondent. [43]

United States Board of Tax Appeals
Washington

Docket No. 102605

PACIFIC SOUTHWEST REALTY CO.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Board, as set forth in its opinion promulgated October 24, 1941, it is Ordered and Decided: That there are deficiencies in income tax for the calendar years 1936 and 1937 in the respective amounts of \$842.75 and \$13,878.81.

Enter:

(Signed) ARTHUR J. MELLOTT

[Seal] Member.

Entered: Oct. 27, 1941. [44]

[Title of Board and Cause.]

PETITION FOR REVIEW BY THE UNITED
STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

To the Honorable Judges of the United States
Circuit Court of Appeals for the Ninth Cir-
cuit:

Comes now Pacific Southwest Realty Company,
by its attorneys, Claude I. Parker, John B. Mil-
liken, Bayley Kohlmeier and L. A. Luce, and re-
spectfully shows:

Pacific Southwest Realty Company respectfully
petitions the United States Circuit Court of Ap-
peals for the Ninth Circuit to review the decision
of the United States Board of Tax Appeals en-
tered on October 27, 1941 (Opinion promulgated
October 24, 1941, 45 B. T. A. No. 74) in which the
Board of Tax Appeals determined deficiencies in
income taxes due from the petitioner for the calen-
dar years 1936 and 1937 in the amounts of \$842.75
and \$13,878.81, respectively, and further deter-
mined that petitioner was not entitled to a refund
of taxes paid by it for the year 1936. [45]

I.

Jurisdiction

Petitioner is a corporation duly organized and
existing under the laws of the State of Delaware
and has its principal office in the City of Los An-
geles, State of California. Petitioner's income tax

returns for the years 1936 and 1937 were filed with the Collector of Internal Revenue for the Sixth Internal Revenue Collection District of California located in the City of Los Angeles, State of California, and within the jurisdiction of the Circuit Court of Appeals of the Ninth Judicial Circuit. The jurisdiction of this Court to review the decision of the United States Board of Tax Appeals aforesaid is founded on Section 1141 Internal Revenue Code, Title 26, United States Code, Section 1141, U. S. C. A.

The Commissioner of Internal Revenue determined deficiencies in petitioner's income taxes for the years 1936 and 1937 in the amounts of \$842.75 and \$13,878.81, respectively, and on February 21, 1940, in accordance with the provisions of Section 272 of the Internal Revenue Code sent to petitioner by registered mail a notice of said deficiencies. On March 6, 1940 petitioner filed with the Collector of Internal Revenue for the Sixth District of California, at Los Angeles, California, its written claim for refund of income taxes overpaid by it for the year 1936 in the amount of \$53,900.53. On May 15, 1940 petitioner filed its appeal to the United States Board of Tax Appeals from the aforesaid determination of deficiencies and prayed therein for determination that there were no deficiencies due from petitioner for income taxes for the years 1936 and 1937 and for a further determination that petitioner overpaid its income taxes for [46] the year 1936 in the amount of \$53,900.53. Said appeal was

called for hearing before the United States Board of Tax Appeals on February 20, 1941 at Los Angeles, California. A stipulation of facts was filed with the Board and oral and documentary evidence was presented. The Board of Tax Appeals rendered its decision approving the deficiencies determined by the Commissioner, as aforesaid, and further determining that the petitioner did not overpay its income taxes for the year 1936. Said decision was entered on October 27, 1941.

II.

Nature of Controversy

The controversy herein involves petitioner's correct income tax liability for the years 1936 and 1937. During the years 1936 and 1937 petitioner had outstanding certain securities designated 6½% Cumulative Preferred Serial Stock and 5½% Cumulative Preferred Serial Stock. Under the terms of petitioner's certificate of incorporation and the terms and conditions on which the aforesaid securities were issued and sold, petitioner was required to make quarterly payments, called dividends, to the holders of said securities at the rate of 6½% and 5½% per annum respectively of the par or face value of said securities. Petitioner was further required to repay to the holders of said securities the par value thereof, plus all accrued and unpaid so-called dividends, on or before a date specified in petitioner's certificate of incorporation and set forth on the certificates which represented

said securities. It was further specifically provided that in the event petitioner failed to redeem said securities at the time specified—"the holders [47] thereof shall have the right to enforce payment of the par value of said stock so agreed to be redeemed, together with the amount of any unpaid or accrued dividends thereon, the same as any unconditional claim or debt against the corporation.

* * * "

During the year 1936 petitioner made payments of so-called dividends to the holders of said securities designated 6½% Cumulative Preferred Serial Stock and 5½% Cumulative Preferred Serial Stock in the amounts of \$65,300.63 and \$55,000.00, respectively. During the year 1937 petitioner made payments of so-called dividends to the holders of 5½% Cumulative Preferred Serial Stock in the amount of \$41,250.00. Said securities designated 5½% Cumulative Preferred Serial Stock were issued at discounts, \$1,833.26 of which was allocable to the year 1936 and \$31,275.39 of which was allocable to the year 1937. During the year 1936 petitioner redeemed all of its then outstanding 6½% Cumulative Preferred Serial Stock at par, plus a premium of \$182,025.00. During the year 1937 petitioner redeemed its 5½% Cumulative Preferred Serial Stock at par, plus a premium of \$20,000.00.

During the year 1935 petitioner repossessed certain real estate previously sold by it on a condi-

tional sales contract under which petitioner retained title to said property until the purchase price was paid. At the time of repossession, property taxes in the amount of \$5,618.35 were assessed against said property but unpaid. During the year 1936 petitioner paid said property taxes. In its income tax return for the year 1936 petitioner did not claim as deductions to \$65,300.63 paid to the holders of the 6½% Cumulative Preferred Serial Stock, the \$55,000.00 paid to the holders [48] of the 5½% Cumulative Preferred Serial Stock, the portion of the discount at which the 5½% Cumulative Preferred Serial Stock was issued or the \$182,025.00 paid as a premium on the redemption of said 6½% Cumulative Preferred Serial Stock. In said return petitioner did deduct as taxes paid the amount of \$5,618.35 paid as taxes on the property repossessed, as aforesaid. On March 6, 1940 petitioner filed its claim for refund of taxes overpaid for the year 1936, in which the aforesaid deductions were claimed.

In its income tax return for the year 1937 petitioner deducted the \$41,250.00 paid by it to the holders of the 5½% Cumulative Preferred Serial Stock as interest paid. deducted the amount of \$31,275.39 as the portion of the discount at which said 5½% Cumulative Preferred Serial Stock was issued, which was allocable to the year 1937, and deducted the amount of \$20,000.00 paid as premium on the redemption of the 5½% Cumulative Preferred Serial Stock.

The Commissioner of Internal Revenue determined that the \$5,618.35 paid by petitioner as taxes, as aforesaid, during the year 1936 was a capital expenditure and was not deductible as taxes paid, and determined a deficiency for the year 1936 in the amount of \$842.75. The Commissioner further determined that petitioner's securities designated 6½% Cumulative Preferred Serial Stock and 5½% Cumulative Preferred Serial Stock were preferred stocks and not indebtedness of petitioner to the holders of said securities, that the payments thereon were dividends and were not interest and that the petitioner was not entitled to deductions for the payments made on said securities, for any portion of the discount for which [49] said securities were issued or for the premium paid on the redemption of said securities. The Commissioner refused to allow the deductions for the aforesaid items in computing the deficiency for the year 1936 and disallowed the deductions taken for said items in petitioner's income tax return for the year 1937. The Commissioner determined a deficiency for the year 1937 in the amount of \$13,878.81. The Board of Tax Appeals in its decision approved the determinations of the Commissioner.

III.

ASSIGNMENTS OF ERROR.

In making and rendering its decision, as aforesaid, the United States Board of Tax Appeals com-

mitted the following errors on which your petitioner relies as the basis for this proceeding:

The United States Board of Tax Appeals erred—

1. In determining a deficiency in petitioner's income tax for the year 1936 in the amount of \$842.75.

2. In failing to determine that petitioner overpaid its income taxes for the year 1936 in the amount of \$53,900.53.

3. In determining a deficiency in petitioner's income tax for the year 1937 in the amount of \$13,878.81.

4. In determining that the securities issued by petitioner and designated as 6½% Cumulative Preferred Serial Stock were preferred stock.

5. In failing and refusing to determine that the securities issued by petitioner and designated as 6½% Cumulative Preferred Serial Stock evidenced indebtedness of the petitioner to the holders of said securities. [50]

6. In determining that the securities issued by petitioner and designated as 5½% Cumulative Preferred Serial Stock were preferred stock.

7. In failing and refusing to determine that the securities issued by petitioner and designated as 5½% Cumulative Preferred Serial Stock evidenced indebtedness of the petitioner to the holders of said securities.

8. In failing and refusing to determine that the sum of \$65,300.63 paid by the petitioner during the

year 1936 to the holders of its securities designated 6½% Cumulative Preferred Serial Stock was interest paid on indebtedness within the meaning of Section 23(b) of the Revenue Act of 1936.

9. In determining that the sum of \$65,300.63 paid by petitioner during the year 1936 to the holders of its securities designated 6½% Cumulative Preferred Serial Stock was not deductible as interest paid on indebtedness.

10. In failing and refusing to determine that the sum of \$55,000.00 paid by the petitioner during the year 1936 to the holders of its securities designated 5½% Cumulative Preferred Serial Stock was interest paid on indebtedness within the meaning of Section 23(b) of the Revenue Act of 1936.

11. In determining that the sum of \$55,000.00 paid by petitioner during the year 1936 to the holders of its securities designated 5½% Cumulative Preferred Serial Stock was not deductible as interest paid on indebtedness.

12. In failing and refusing to determine that the sum of \$41,250.00 paid by the petitioner during the year 1937 to the holders [51] of its securities designated 5½% Cumulative Preferred Serial Stock was interest paid on indebtedness within the meaning of Section 23(b) of the Revenue Act of 1936.

13. In determining that the sum of \$41,250.00 paid by petitioner during the year 1937 to the holders of its securities designated 5½% Cumula-

tive Preferred Serial Stock was not deductible as interest paid on indebtedness.

14. In failing and refusing to determine that petitioner was entitled to a deduction for the year 1936 for the portion of the discount at which its securities designated 5½% Cumulative Preferred Serial Stock were sold which was allocable to 1936.

15. In failing and refusing to determine that petitioner was entitled to a deduction for the year 1937 for the portion of the discount at which its securities designated 5½% Cumulative Preferred Serial Stock were sold which was allocable to 1937.

16. In failing and refusing to determine that petitioner was entitled to a deduction for the year 1936 in the amount of \$182,025.00 for the premium paid by petitioner during the year 1936 on the redemption of its securities designated 6½% Cumulative Preferred Serial Stock.

17. In failing and refusing to determine that petitioner was entitled to a deduction for the year 1937 in the amount of \$20,000.00 for the premium paid by petitioner during the year 1937 on the redemption of its securities designated 5½% Cumulative Preferred Serial Stock.

18. In failing and refusing to determine that petitioner was entitled to a deduction for real estate taxes paid by petitioner during the year 1936 in the amount of \$5,618.35. [52]

Wherefore, your petitioner prays that this Honorable Court may review the decision and order of the United States Board of Tax Appeals, set

aside the same and direct the entry of a decision by said Board determining that there are no deficiencies in income taxes due from the petitioner for the years 1936 and 1937 and further determining that petitioner overpaid its income taxes for the year 1936 in the amount of \$53,900.53 and for such other and further relief as to this Court may seem proper in the premises.

Respectfully submitted,

CLAUDE I. PARKER

JOHN B. MILLIKEN

BAYLEY KOHLMEIER

808 Bank of America Building,
Los Angeles, California

Attorneys for Petitioner.

Of Counsel:

L. A. LUCE

937 Munsey Building,
Washington, D. C.

[Endorsed]: U. S. B. T. A. Filed Dec. 26, 1941.

[53]

[Title of Board and Cause.]

NOTICE OF FILING PETITION FOR
REVIEW

To the Honorable Guy T. Helvering, Commissioner of Internal Revenue, Washington, D. C., and the Honorable J. P. Wenchel, Chief Counsel of the Bureau of Internal Revenue, Attorney for Respondent, Washington, D. C.

You and each of you are hereby notified that on the 26th day of December, 1941, the Pacific Southwest Realty Company filed with the Clerk of the United States Board of Tax Appeals its Petition for Review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of the United States Board of Tax Appeals heretofore rendered in the above entitled cause.

A copy of the petition as filed is attached hereto and [54] served upon you.

Dated: Dec. 26, 1941.

CLAUDE I. PARKER,
JOHN B. MILLIKEN
BAYLEY KOHLMEIER

808 Bank of America Building

Los Angeles, California

Attorneys for Petitioner

Of Counsel:

L. A. LUCE

937 Munsey Building,

Washington, D. C.

Service of the foregoing Notice of Filing and a copy of Petition for Review is hereby acknowledged this 26th day of Dec., 1941.

J. P. WENCHEL,
C.A.R.

Attorney for Respondent.

[Endorsed]: U. S. B. T .A. Filed Dec. 26, 1941.

[55]

[Title of Board and Cause.]

STATEMENT OF EVIDENCE

The following is a statement of the evidence submitted to the United States Board of Tax Appeals in the above cause so far as is necessary to the assignments of error filed herein.

The above entitled case came on for hearing at Los Angeles, California before the Honorable Arthur J. Mellott, Member of the United States Board of Tax Appeals, on February 20, 1941, Claude I. Parker, Bayley Kohlmeier and Stuart T. Baron appearing on behalf of petitioner and E. A. Tonjes appearing on behalf of the respondent.

After the opening statements by counsel for the parties there was offered and received by the Board a Stipulation of Facts with exhibits attached thereto. A true copy of said Stipulation of Facts and the exhibits thereto is attached hereto as Exhibit No. 1 and is by this reference hereby made a part of this Statement of Evidence. Thereupon there was of-

ferred and received in evidence as Joint Exhibit A-1 the income and excess-profits tax return of Pacific Southwest Realty Company for the year 1936. Thereupon there was offered and received in evidence as Joint Exhibit B-2 the income and [56] excess-profits tax return of the Pacific Southwest Realty Company for the year 1937. Photostatic copies of said returns are attached hereto and made a part hereof as Joint Exhibits A-1 and B-2.

Form 1120
TRAFFIC DEPARTMENT
INSTRUCTIONS
(United States)

CORPORATION INCOME AND EXCESS-PROFITS TAX RETURN

Page 1 of Return

For Calendar Year 1936

or Fiscal Year begun 1936, and ended 1937
FIRST PLINLY CORPORATION'S NAME AND BUSINESS ADDRESS

Pacific Southwest Realty Company

215 West Sixth Street

Los Angeles Los Angeles California

Not Essential, Except Where Otherwise Provided in the Instructions, That This Form be Completely Filled In Respect of Any Statements, Schedules, or Reports Submitted Herewith

File Code 18
Serial Number
Debtor
(if debtor's return)

EXCESS-PROFITS TAX COMPUTATION

Item No.	Item Description	Amount	Item No.	Item Description	Amount
1	Value of capital stock as declared in your capital-stock tax return for year ended June 30, 1936 (or your capital-stock tax return for year ended June 30, 1937, if your income tax fiscal year began in 1936 and ended on or after July 31, 1937)	3 500 000 00	7	Net income subject to excess-profits tax (amount of item 6)	None
2	Net income for excess-profits tax computation (item 27, page 2)	562 740 52	8	Amount taxable at 6 percent (item 7 or 8 percent of item 1, whichever is less)	None
3	Less: Dividends received credit (65 percent of item 12 (a), page 2)	562 740 52	9	Amount taxable at 12 percent (item 7 minus item 8)	None
4	Balance of net income	562 740 52	10	Excess-profits tax at 6 percent (6 percent of item 8)	None
5	Less: 10 percent of item 1	50 000 00	11	Excess-profits tax at 12 percent (12 percent of item 9)	None
6	Net income subject to excess-profits tax (carry forward as item 7)	None	12	Total excess-profits tax (total of items 10 and 11)	None

Note.—Where an affiliated group of railroad corporations makes a consolidated income tax return, the common parent corporation and each subsidiary which is liable for the making of an excess-profits tax return must make a separate excess-profits tax return on this form. (See Instruction 28.)

INCOME TAX COMPUTATION

NORMAL TAX

13	Net income for income tax computation (item 20, page 2)	562 740 52
14	Less: Interest on obligations of United States, etc. (item 8, page 2)	
15	Dividends received credit (85 percent of item 12 (a), page 2) (this credit not allowed to mutual investment companies)	
16	Dividends paid credit (this credit allowed only to mutual investment companies)	
17	Normal-tax net income (item 13 minus items 14 and 15 or 14 and 16)	562 740 52
18	Tax on portion of item 17 not in excess of \$7,000	160 00
19	Tax on portion of item 17 in excess of \$7,000 and not in excess of \$15,000	1 430 00
20	Tax on portion of item 17 in excess of \$15,000 and not in excess of \$40,000	3 250 00
21	Tax on portion of item 17 in excess of \$40,000	78 411 08
22	TOTAL NORMAL TAX (Amount of tax in items 18 to 21, inclusive)	83 251 08

* Foreign corporations engaged in trade or business within the United States or having an office or place of business therein are taxable at the rate of 22 percent on item 17, and certain banks and trust companies (see Instruction 31), corporations entitled to the benefits of Section 281 of the Revenue Act of 1936, corporations organized under the China Trade Act, 1923, and insurance companies are taxable at the rate of 18 percent on item 17, instead of at the rates prescribed in items 18 to 21, inclusive, above. In such case the amount of tax should be entered as item 22, and the taxpayer's classification should be indicated by a check mark (✓) in the appropriate box space in this note.

SURTAX ON UNDISTRIBUTED PROFITS

(See Instruction 32 respecting corporations exempt from surtax)

23	Net income for surtax computation (item 29, page 2)	562 740 52
24	Less: Normal tax (item 22, above)	83 251 08
25	Interest on obligations of United States, etc. (item 8, page 2)	
26	Credit allowable to holding company affiliate (see Instruction 33)	
27	Credit allowable to national mortgage association (see Instruction 34)	
28	Adjusted net income (item 23 minus items 24-27)	479 489 44
29	Less: Dividends paid credit (see Instruction 35)	
30	Credit for contracts restricting dividend payments (see Instruction 36)	
31	Undistributed net income (item 28 minus items 29 and 30)	None
32	Less: Specific credit allowable only where adjusted net income (item 28, above) is less than \$50,000 (item 31 or \$5,000, whichever is less, minus 10% of item 28) (see Instruction 37)	None
33	Remainder subject to surtax (item 31 minus item 32)	None
34	Tax on portion of item 33 not in excess of 10% of item 28	
35	Tax on portion of item 33 in excess of 10% and not in excess of 20% of item 28	
36	Tax on portion of item 33 in excess of 20% and not in excess of 40% of item 28	
37	Tax on portion of item 33 in excess of 40% and not in excess of 60% of item 28	
38	Tax on portion of item 33 in excess of 60% of item 28	
39	Amount of tax in items 34 to 38, inclusive	None
40	Plus: 7% of amount of specific credit (item 32)	
41	TOTAL SURTAX (item 39 plus item 40)	None
42	TOTAL NORMAL TAX AND SURTAX (item 22 plus item 41)	83 251 08
43	Less: Income tax paid to a foreign country or United States possession by a domestic corporation (see Instruction 38)	
44	BALANCE OF TAX (item 42 minus item 43)	83 251 08

a-1

Date of incorporation May 31, 1923 Under the laws of the State of California

The corporation's books are in care of William Murphy, A. L. & Son, 1211 1/2 S. 1st Street, Los Angeles, California

Kind of business (in detail) improved real estate Is this a consolidated return of railroad corporations? No If so, (also check industrial division on page 4)

If this is not a consolidated income tax return of railroad corporations, did the corporation at any time during its taxable year own 80 percent or more of the voting stock of another corporation or corporations? Yes If so, attach separate schedule showing with respect to each corporation: (1) name and address of corporation, (2) percentage of stock owned, (3) date stock was acquired, and (4) the collector's office in which the corporation's income tax return for the taxable year was filed.

Is the corporation a personal holding company within the meaning of Section 351 of the Revenue Act of 1936? No (If so, an additional return on Form 1120H must be filed.)

Did the corporation make a return of information on Forms 1096 and 1099 (see Instruction 46) for the calendar year 1936? Yes

NET INCOME COMPUTATION

GROSS INCOME		Less Returns and Allowances, \$		Net Sales, \$	
1. Gross Sales (where inventories are an income-determining factor), \$					
2. Less Cost of Goods Sold:					
(a) Inventory at beginning of year					
(b) Material or merchandise bought for manufacture or sale					
(c) Miscellaneous costs (from Schedule A, Column 1):					
(1) Salaries and wages, \$					
(2) Other costs, \$					
(d) Total of lines (a), (b), and (c)					
(e) Less inventory at end of year					
3. Gross Profit from Sales (Item 1 minus Item 2)					
4. Gross Receipts (where inventories are not an income-determining factor), \$					
5. Less cost of operations (from Schedule A, Column 2):					
(a) Salaries and wages, \$					
(b) Other costs, \$					
(c) Total					
6. Gross Profit where inventories are not an income-determining factor (Item 4 minus Item 5)					
7. Interest on Loans, Notes, Mortgages, Bonds, Bank Deposits, etc.					44 28
8. Interest on Government obligations, etc. (from Schedule M, Lines 4 (a) (6) and (7))					
9. Rents				1 307	655 52
10. Royalties					
11. Capital Gain or Loss (from Schedule B) (If loss, enter such loss or \$2,000, whichever is less)				2	000 00
12. Dividends on Stock of:					
(a) Domestic Corporations subject to taxation under Title I of Revenue Act of 1936					
(b) Domestic Corporations not subject to taxation under Title I of Revenue Act of 1936					
(c) Foreign Corporations					
13. Other Income (State nature of income) (Use separate schedule, if necessary) <u>Sch. No. 1 attached</u>				45	165 72
14. TOTAL INCOME IN ITEMS 3 AND 6 TO 13, INCLUSIVE					350 865 52
DEDUCTIONS					
15. Compensation of Officers (from Schedule C)					
16. Rent on Business Property					
17. Repairs (from Schedule E): (a) Salaries and Wages, \$; (b) Other Costs, \$; Total					
18. Bad Debts (from Schedule F); also bonds determined to be worthless during taxable year (explain on separate sheet)					
19. Interest Paid (from Schedule G)				244	574 33
20. Taxes Paid (from Schedule H). (Do not include Federal Excess-Profits Tax Reported in Item 28, below)				182	863 80
21. Contributions or Gifts (from Schedule I)					
22. Losses by Fire, Storm, etc. (from Schedule J)				6	582 73
23. Depreciation (resulting from exhaustion, wear and tear, or obsolescence) (from Schedule K)				131	881 10
24. Depletion of Mines, Oil and Gas Wells, Timber, etc. (Submitt schedule, see Instruction 24)					
25. Other Deductions Authorized by Law (explain below, or on separate sheet):					
(a) Salaries and wages. (Not included in Items 3, 8, 15, or 17 above)				136	833 07
(b) Stock determined to be worthless during the taxable year					
(c) Schedule No. 2 attached				85	389 97
26. TOTAL DEDUCTIONS IN ITEMS 15 TO 25, INCLUSIVE					788 125 00
27. NET INCOME FOR EXCESS-PROFITS TAX COMPUTATION (Item 14 minus Item 26)					562 740 52
28. LESS: FEDERAL EXCESS-PROFITS TAX (Item 12, Page 1)					None
29. NET INCOME FOR INCOME TAX COMPUTATION (Item 27 minus Item 28)					562 740 52

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1. COST OF SALES (WHERE INVENTORIES ARE AN INCOME DETERMINING FACTOR)

2. COST OF OPERATIONS (WHERE INVENTORIES ARE NOT AN INCOME DETERMINING FACTOR)

Item	Amount (Enter on Item 2 (a), page 2)	Item	Amount (Enter on Item 2 (b), page 2)
Salaries and wages		Salaries and wages	
Other costs		Other costs	

SCHEDULE B—CAPITAL GAINS AND LOSSES (FROM SALES OR EXCHANGES ONLY) (See Instruction 11)

1. Description of Property	2. Date Acquired	3. Date Sold	4. Gross Sales Price (If sold on credit)	5. Cost	6. March 1, 1913, Value (If After March 1, 1913)	7. Cost of Service (If sold on credit or March 1, 1913)	8. Information as to the Basis (If sold on credit or March 1, 1913)	9. Gain or Loss
Real estate	4-28-24	5-26-35	2,000.00	9,376.30				\$2,313.46

Gain or Loss (enter net amount as Item 11, page 2; if net amount is a loss, enter that amount or \$2,000, whichever is less)

State (1) how property was acquired **Purchased**; (2) whether at time of sale or exchange purchaser owned more than 50% in value of your outstanding stock **No**

Every sale or exchange of stock should be reported in detail, including name and address of corporation, class of stock, number of shares, capital changes affecting basis (stock dividends, other nontaxable dividends, stock rights, etc.)

Cost of property must be entered in column 5 if a loss is claimed in column 9.

SCHEDULE C—COMPENSATION OF OFFICERS (See Instruction 16)

1. NAME AND ADDRESS OF OFFICER	2. OFFICIAL TITLE	3. TYPE OF SERVICE TO BUSINESS	4. SHARES OF STOCK OWNED		5. AMOUNT OF COMPENSATION (Enter on Item 17, page 2)
			A. Common	B. Preferred	

Note: Schedule C-1 (IN DUPLICATE) also must be filed with this return if compensation in excess of \$15,000 was paid to any officer or employee.

SCHEDULE D—INCOME FROM DIVIDENDS (See Instruction 12)

Itemize below all dividends received during the year, stating the amount and the name and address of the corporation which declared the dividend:

SCHEDULE E—COST OF REPAIRS (See Instruction 17)

1. ITEM	2. AMOUNT (Enter on Item 17, page 2)
Salaries and wages	
Other costs	

SCHEDULE F—BAD DEBTS (See Instruction 18)

1. YEAR	2. NET INCOME	3. BASIS OF ACCOUNT	4. BAD DEBTS
1932			
1933			
1934			
1935			
1936			

SCHEDULE G—INTEREST PAID (See Instruction 19)

1. TO WHOM PAID	2. AMOUNT (Enter on Item 19, page 2)
Pacific Mutual Life Insurance Company, Los Angeles	187,754.00
Security-First National Bank of Los Angeles	56,476.25
Interest on additional Federal income tax for the income year 1934	209.73
Interest on additional State franchise tax for the income year 1934	88.67
California Unemployment Reserves Commissions	45.40
Mrs. Mary B. Gates	28.28
	244,574.33

SCHEDULE H—TAXES PAID (See Instruction 20)

1. NATURE OF TAX	2. TO WHOM PAID	3. AMOUNT (Enter on Item 20, page 2)
Franchise tax	State of California	17,273.23
Franchise tax	State of Delaware	350.00
Capital stock tax	Federal	2,500.00
Personal Property Tax	City and County of Los Angeles	58.69
Real Property Tax	Various Treasurers	154,486.32
Unemployment Insurance Tax	State of California	22.22
		174,688.24

Total (Enter on Item 21, page 2, subject to 5% limitation (see Instruction 21))

\$

SCHEDULE J—EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC. (See Instruction 22)

1. KIND OF PROPERTY	2. DATE ACQUIRED	3. COST	4. DEPRECIATION ALLOWED (SEE INSTRUCTIONS)	5. DEPRECIATION ALLOWED (SEE INSTRUCTIONS)	6. INSURANCE AND SALVAGE VALUE	7. DEDUCTIBLE LOSS (Enter on Item 21, page 2)
Buildings (Branley)	4-22-24	\$ 13,053.46		\$ 5,723.53	\$ 3,225.20	\$ 4,054.73
Building (Santa Monica)	7-3-28	3,000.00		972.00	100.00	2,528.00
						6,582.73

State how property was acquired.

Purchased

SCHEDULE K—EXPLANATION OF DEDUCTION FOR DEPRECIATION (See Instruction 23)

1. KIND OF PROPERTY (If building, state material of which constructed)	2. DATE ACQUIRED	3. COST OR MAR. V. 1913 VALUE (If acquired prior to 1913, state basis)	4. AMOUNT FULLY DEPRECIATED (SEE INSTRUCTIONS)	5. DEPRECIATION ALLOWED (SEE INSTRUCTIONS)	6. DEPRECIATION COST (SEE INSTRUCTIONS)	7. LOSS (SEE INSTRUCTIONS)	8. DEPRECIATION ALLOWABLE THIS YEAR (Enter on Item 21, page 2)
Schedule No. 3 attached							

NATURE OF BUSINESS

1. Check the block in which the industrial division in which the corporation's main income-producing business is conducted.

MANUFACTURING

- ☐ Food and kindred products
- ☐ Bakery and confectionary products.
- ☐ Canned products—fish, fruit, vegetables, etc.
- ☐ Mill products—flour, feed, etc.
- ☐ Packing-house products—meats, lard, slaughter.
- ☐ Paper—beat, mass, rough; bookman, etc.
- ☐ Other food products—butter substitutes, etc., coffee, spices, dairy products, etc., etc.
- ☐ Beverages, soft drinks, mineral water.
- ☐ Brewing and distilling—alcohol, liquors, beer, malt, etc., etc.
- ☐ Tobacco products.
- ☐ Textiles
- ☐ Cotton goods—fine goods, etc.; apparel, etc.
- ☐ Woollen and worsted goods—fine goods, etc.; wool putting, etc.
- ☐ Silk and rayon goods—fine goods, threads, etc., etc.; spinning, weaving.
- ☐ Carpets, floor coverings, tapestries, etc.
- ☐ Other textile goods—fine, etc.; rayon, artificial leather, surgical cotton, etc.
- ☐ Rubber—concentrates, latex—made, unmade, etc.
- ☐ Rubber goods—tires, etc.
- ☐ Leather goods—fine, etc.; etc.
- ☐ Other leather products—saddlery, harness, etc.
- ☐ Rubber goods—tires, etc.
- ☐ Bone, celluloid, and ivory products.
- ☐ Sewing and making cloth products.
- ☐ Furriers (not made).
- ☐ Other wool products—carpets, etc.
- ☐ Paper, pulp and products.
- ☐ Printing, publishing, and allied industries.
- ☐ Petroleum and other mineral oil refining and products.
- ☐ Chemicals, explosives, etc.
- ☐ Allied chemical substances, drugs, etc.
- ☐ Paints, pigments, varnishes, etc.
- ☐ Pottery.
- ☐ Glass, clay, stone, and related products.

MANUFACTURING—(Continued)

- ☐ Metal products and processes—Castings.
- ☐ Machinery—factory, used in producing food, leather, metal, paper, printing, rubber, etc., etc.; plant, tools and wood products.
- ☐ Machinery—structural and equipment.
- ☐ Machinery—electrical and equipment.
- ☐ Machinery—other, building, construction, etc., and mining machinery and equipment.
- ☐ Household equipment—metal furniture, refrigerators, etc.
- ☐ Other equipment.
- ☐ Metal building material and equipment.
- ☐ Hardware, tools, etc.
- ☐ Precision metal, products and processes.
- ☐ Other metal, products and processes.
- ☐ Miscellaneous manufacturing:
- ☐ Medical, samples of parts.
- ☐ Medical, professional, and scientific instruments.
- ☐ Alloys, etc.
- ☐ Alloys, etc.

NONMANUFACTURING

- ☐ Trade
- ☐ Wholesale
- ☐ Retail
- ☐ Wholesale and retail.
- ☐ Commission.
- ☐ Other trade—regular service, garage, etc.
- ☐ Finance
- ☐ Banks—national, State, private, savings, etc.
- ☐ Trust and bond brokers, investment banks, etc.
- ☐ Real estate, realty holding, and estate agents.
- ☐ Insurance companies, trust companies.
- ☐ Investment trusts, stock syndicates, etc.
- ☐ Other finance—loan companies, building and loan associations, etc.
- ☐ Agriculture and related industries, including fishing, forestry, etc.
- ☐ Mining and quarrying, including gas and oil wells, heating and power.
- ☐ Construction—contracting, bridges, building, etc.
- ☐ Transportation—rail, water, aerial, motor, etc.
- ☐ Storage and storage, grain elevators, warehouses, etc.
- ☐ Public utilities—electric light and power, gas, etc.
- ☐ Telephones, etc.
- ☐ Other utilities.
- ☐ Service—professional, business, etc.

AFFILIATIONS WITH OTHER CORPORATIONS (See Instruction 24)

1. Is this a consolidated return? No. If so, please have the schedule of income revenue for your district from RM, All-American Schedule, which shall be filed in, even in, and find as a part of the return.
2. Was the income of this corporation included in a consolidated return for any prior year? Yes. If so, give name and address of corporation which filed the consolidated return and the last year for which such a return was filed. Period from 1-1 to 12-31-33 with Security-First Company, Los Angeles; Period from 1-1 to 12-31-33 with Security-First National Bank of Los Angeles
3. Did the corporation file a return under the same name for the preceding taxable year? Yes. Was the corporation in any way an owner, partner, stockholder, or member of a business or business in existence during this or any prior year than December 31, 1933? No. If answer is "yes", give name and address of such business, and the date of the change in entity.

Upon such change was any asset value increased or decreased?

If the answer is "yes", state business change of old business and specify business change of new business.

BASES OF RETURN

2. Is this return made on the basis of such receipts and disbursements? Yes. If not, describe fully when other basis or method was used in computing net income.

VALUATION OF INVENTORY

3. State whether the inventory at the beginning and end of the taxable year was valued at cost, or cost or market, whichever is lower. If other basis was used, describe fully, state why used and the date inventory was last reconciled with stock.

PREPARATION OF RETURN (See "Signatures and Verification", page 6)

4. Did any person or persons advise the corporation in respect of any question or matter affecting any item or schedule of this return, or assist or advise the corporation in the preparation of this return, or actually prepare this return for the corporation? Yes. If so, give the name and address of each person or persons and state the nature and extent of the assistance or advice rendered and the time and substance in respect of which the assistance or advice was rendered. If this return was actually prepared by any person or persons other than the corporation, state the nature of the information reported in this return and the manner in which it was furnished to or obtained by each person or persons.
- Office of Claude L. Parker, 202 Bank of America Building, Consultation and Advice, Prepared by Audit Department, Security-First National Bank of Los Angeles, from records of the corporation

LIST OF ATTACHED SCHEDULES

5. Enter under a list of all schedules accompanying this return, giving for each a brief title and the schedule number. The name and address of the corporation should be placed on each separate schedule accompanying the return.
- Sch. No. 1 - Other Income
- Sch. No. 2 - Other Deductions
- Sch. No. 3 - Depreciation
- Sch. No. 4 - Balance sheets
- Sch. No. 5 - Other credits to surplus
- Sch. No. 6 - 50% or more owned Corporation

1. Name of the corporation: **THE VIRGIN ISLANDS TRADING COMPANY, INC.**

2. Principal office: **1000 ...**

3. Date of filing: **March 1937**

4. Taxable year: **1936**

5. Total of Lines 1 to 4, inclusive: **562 740 52**

6. Total from Line 5: **562 740 52**

7. Net profit or loss for the year, as shown by books: **62 664 32**

8. Net profit or loss for the year, as shown by balance sheet at close of preceding taxable year: **501 076 20**

9. Other income or expenses (to be detailed): **733 191 67**

10. Schedule No. 5 attached: **682 952 16**

11. Total of Lines 6 to 10, inclusive: **1 917 220 03**

12. Total from Line 11: **1 917 220 03**

13. Net profit or loss for the year, as shown by books: **702 325 63**

14. Net profit or loss for the year, as shown by balance sheet at close of preceding taxable year: **214 894 40**

15. Total of Lines 12 to 14, inclusive: **3 056 84 1**

16. Total from Line 15: **3 056 84 1**

17. Total of Lines 15 to 17, inclusive: **61 644 32**

18. Total from Line 18: **61 644 32**

19. Total of Lines 18 to 20, inclusive: **256 980 63**

20. Total from Line 20: **256 980 63**

21. Total of Lines 20 to 22, inclusive: **15 797 58**

22. Total from Line 22: **15 797 58**

23. Total of Lines 22 to 24, inclusive: **13 750 00**

24. Total from Line 24: **13 750 00**

25. Total of Lines 24 to 26, inclusive: **400 000 00**

26. Total from Line 26: **400 000 00**

27. Total of Lines 26 to 28, inclusive: **702 325 63**

28. Total from Line 28: **702 325 63**

LIABILITY FOR FILING RETURNS

Corporations generally.—Every domestic or resident corporation, joint-stock company, association, or insurance company (other than a life insurance company) not specifically exempted by Section 101 of the Revenue Act of 1936, whether or not having any net income, must make a return of income for the taxable year ending at the close of the first year in respect of which it is subject to the capital-stock tax. A combined return for income and excess-profits tax purposes must be made on this form, except where a consolidated income tax return is made by an affiliated group of railroad corporations. (See Instruction 30.)

Domestic corporations within the possessions of the United States (except the Virgin Islands) may report as gross income only gross income from sources within the United States provided (a) 80 percent or more of the gross income for the three-year period immediately preceding the close of the taxable year (or such part thereof as may be applicable) was derived from sources within a possession of the United States; and (b) 80 percent or more of the gross income for such part thereof was derived from the active conduct of a trade or business within a possession of the United States.

Foreign corporations.—Resident foreign corporations (foreign corporations which at any time within the taxable year are engaged in trade or business within the United States or have an office or place of business therein) shall make returns on this form of income received from sources within the United States. Nonresident foreign corporations (foreign corporations not engaged in trade or business within the United States and not having an office or place of business therein at any time within the taxable year) shall not make returns on this form. Nonresident foreign corporations are subject to tax upon gross income from sources within the United States (determined under the provisions of Section 119 of the Revenue Act of 1936) which is fixed or determinable annual or periodical gain, profit, and income, and are required to make returns on Form 1120-B with respect to such income. (See Sections 231 to 236, Revenue Act of 1936.)

Life insurance companies.—As defined by Section 201 of the Revenue Act of 1936, shall file returns on Form 1120-L, instead of this form.

Mutual insurance companies (other than life insurance companies) shall make and file returns in accordance with the provisions of Section 207 of the Revenue Act of 1936 and Articles 207-1 to 207-7 of Regulations 94.

Nonresident life insurance associations of a purely local character, mutual stock companies, and other organizations are exempt from taxation only if 85 percent or more of the income consists of amounts collected from members for the sole purpose of meeting losses and expenses.

Other insurance companies.—The normal-tax net income of an insurance company (other than a life or mutual insurance company referred to above) shall be computed as provided in Section 204 of the Revenue Act of 1936.

TIME AND PLACE FOR FILING

The return must be filed on or before the fifteenth day of the third month following the close of the taxable year with the collector for the district in which the corporation's principal place of business or principal office or agency is located.

AFFIDAVIT (See "Signatures and Verification," above)

We, the undersigned, president (or vice president, or other principal officer) and treasurer (or assistant treasurer, or chief accounting officer) of the corporation for which this return is made, being severally duly sworn, each for himself depose and say that this return (including any accompanying schedules and statements) has been examined by him and is, to the best of his knowledge and belief, a true, correct, and complete return, made in good faith, for the taxable year ended on or before the Revenue Act of 1936, and the Regulations thereunder, and the Revenue Act of 1936, and the Regulations thereunder, and the Revenue Act of 1936, and the Regulations thereunder.

Subscribed and sworn to before me this 12th day of March, 1937.

Signature of officer administering oath: **W. A. LIO** (Title)

Signature of officer administering oath: **W. A. LIO** (Title)

Signature of officer administering oath: **W. A. LIO** (Title)

Signature of officer administering oath: **W. A. LIO** (Title)

Signature of officer administering oath: **W. A. LIO** (Title)

Signature of officer administering oath: **W. A. LIO** (Title)

Signature of officer administering oath: **W. A. LIO** (Title)

Pacific Southwest Realty Company, Los Angeles
Year 1936

SCHEDULE NO. 1—OTHER INCOME

Item 13

	Amount
Service fees	\$41,691.30
Agency fees	3,000.00
Commissions received on telephone.....	128.94
Commissions received on towels.....	102.26
Sale of baled waste paper.....	164.69
Miscellaneous	78.53
	<hr/>
	\$45,165.72

SCHEDULE NO 2—OTHER DEDUCTIONS
AUTHORIZED BY LAW

	Amount
Refinancing expense	\$ 1,914.69
Lighting assessment	665.59
Insurance	6,394.27
Building equipment and supplies.....	576.13
Window washing, services, etc.....	6,961.53
Building repairs	25,769.53
Machinery maintenance and repairs.....	6,144.65
Water, fuel, power, and light.....	24,239.84
Engineers' and janitors' supplies.....	2,366.51
Directors' fees	175.00
Commission	3,560.48
Postage, stationery and supplies.....	723.41
Telephone and telegraph.....	584.09
Subscription and dues.....	623.56
Legal	3,612.36
Auto and travel.....	655.04
Miscellaneous	423.29
	<hr/>
	\$85,389.97

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SCHEDULE NO. 3

Pacific Southwest Realty Company, Los Angeles

Year 1936

SCHEDULE K—EXPLANATION OF DEDUCTION FOR DEPRECIATION

Kind of Property	2. Date Acquired	3. Cost	5. Depreciation allowed (or allowable) In prior years	6. Remaining Cost to be Recovered	7. Life used in accumulating Depreciation (Years)	8. Est. remaining life from beginning of year (Years)	9. Depreciation allowable this year
Buildings							
1. Alhambra—Brick.....	7- 1-23	\$ 32,727.28	\$ 10,912.65	\$ 21,814.63	12 1/2	28 1/2	\$ 765.42
2. Carpinteria—Brick.....	7- 1-23	15,446.92	4,810.12	10,636.80	12 1/2	35 1/2	299.62
3. El Centro—Brick.....	7- 1-23	20,209.45	6,797.45	13,412.00	12 1/2	27 1/2	487.71
4. Glendale—Brick.....	7- 1-23	11,251.10	3,814.06	7,437.04	12 1/2	27 1/2	270.43
5. Hanford—Brick.....	7- 1-23	45,650.00	23,709.17	21,940.83	12 1/2	14 1/2	1,513.16
8. Guadalupe—Brick.....	7- 1-23	9,602.31	2,920.18	6,682.13	12 1/2	35 1/2	188.22
10. Lemoore—Brick.....	7- 1-23	21,000.00	7,119.00	13,881.00	12 1/2	27 1/2	504.76
11. Lompoc—Brick.....	7- 1-23	29,151.56	9,825.38	19,326.18	12 1/2	27 1/2	702.77
12. Los Alamos—Brick.....	7- 1-23	6,020.83	2,041.03	3,979.80	12 1/2	27 1/2	144.72
13. Main & Commercial—Brick.....	7- 1-23	12,027.25	5,979.92	6,047.33	12 1/2	17 1/2	345.56
14. Sixth & Spring—Steel & Concrete.....	7- 1-23	678,516.36	216,630.42	461,885.94	12 1/2	26 1/2	17,396.85
15. Ocean Park—Brick.....	7- 1-23	40,510.76	13,733.14	26,777.62	12 1/2	27 1/2	973.73
16. Orcutt—Concrete.....	7- 1-23	8,273.75	3,686.72	4,587.03	12 1/2	27 1/2	166.80
17. Oxnard—Brick.....	7- 1-23	78,361.02	19,590.25	58,770.77	12 1/2	37 1/2	1,567.22
18. San Luis Obispo—Brick.....	7- 1-23	22,655.24	8,258.63	14,396.61	12 1/2	20 1/2	702.27
19. San Luis Obispo—Brick.....	7-10-24	2,090.92	1,002.66	1,088.26	11 1/2	18 1/2	58.82
20. Marine—Brick.....	7- 1-23	48,183.00	16,177.12	32,005.88	12 1/2	27 1/2	1,163.85
21. Santa Maria—Brick.....	7- 1-23	100,000.00	25,000.00	75,000.00	12 1/2	37 1/2	2,000.00
21. Santa Maria—Brick.....	7- 1-23	5,582.72	1,941.55	3,641.17	12 1/2	20 1/2	177.62
22. Tulare—Brick.....	7- 1-23	40,000.00	15,000.00	25,000.00	12 1/2	20 1/2	1,219.51
23. Venice—Brick.....	7- 1-23	25,571.50	8,522.63	17,048.87	12 1/2	27 1/2	619.96
24. Visalia—Brick.....	7- 1-23	59,349.50	26,500.70	32,848.80	12 1/2	17 1/2	1,877.07
25. Whittier—Brick.....	7- 1-23	26,460.55	8,303.22	18,157.33	12 1/2	34 1/2	526.30
26. Redlands—Brick.....	7- 1-23	4,281.90	2,128.99	2,152.91	12 1/2	17 1/2	123.02
27. Redlands—Steel & Concrete.....	7- 1-23	97,318.70	24,013.83	73,304.87	12 1/2	37 1/2	1,954.80
33. Lindsay—Brick.....	4-28-24	34,765.92	15,828.17	18,937.75	11 2/3	18 1/3	1,032.97
35. Strathmore—Hollow Tile (Sold-5-26-36).....	4-28-24	7,126.30	2,247.36	4,878.94	11 2/3	28 1/3	72.10 (5 mo.
36. Exeter—Brick.....	4-28-24	6,000.00	1,906.20	4,093.80	11 2/3	28 1/3	144.49
38. Saticoy—Concrete.....	4-28-24	6,000.00	1,906.20	4,093.80	11 2/3	28 1/3	144.49
39. Fillmore—Concrete.....	4-28-24	20,900.99	4,781.39	16,119.60	11 2/3	28 1/3	568.93
40. Brawley—Brick.....	4-28-24	14,683.37	6,454.30	8,229.07	11 2/3	18 1/3	448.86
40. Brawley—Brick.....	4-28-24	10,110.67	4,442.89	5,667.78	11 2/3	18 1/3	309.15
40. Brawley Add.—Concrete.....	5- 1-36	5,200.69	0.00	5,200.69		50	69.32 (8 mo.
41. Calipatria—Brick.....	4-28-24	22,994.00	9,316.60	13,677.40	11 2/3	28 1/3	482.73

Kind of Property	2. Date Acquired	3. Cost	5. Deprecia- tion allowed (or allowable) In prior years	6. Remaining Cost to be Recovered	7. Life used in accumu- lating Depreci- ation (Years)	8. Est. remain- ing life from be- ginning of year (Years)	9. Depre- ciation allowable this year
42. Westmoreland—Concrete.....	4-28-54	\$ 18,000.00	\$ 5,265.00	\$ 12,735.00	11 2/3	35 1/3	\$ 360.42
43. Avalon & Vernon—Brick.....	6-24-25	32,000.00	7,968.00	24,032.00	10 1/2	39 1/2	608.40
44. Santa Paula—Concrete & Brick.....	6-24-25	60,000.00	16,272.00	43,728.00	10 1/2	36 1/2	1,198.03
45. Fullerton—Brick.....	6-24-25	69,077.60	20,230.83	48,846.77	10 1/2	29 1/2	1,655.82
45. Fullerton—Concrete & Hollow Tile.....	9-15-30	9,611.66	1,329.81	8,281.85	5 1/2	34 1/2	238.33
47. Jefferson & University—Brick.....	1925	54,750.00	14,804.55	39,945.45	11	39	1,011.28
48. Desmond's—Brick & Concrete.....	1925	430,014.18	114,805.84	315,208.34	11	39	7,979.96
49. Porterville—Brick.....	9-28-27	45,408.85	10,113.94	35,294.91	8 1/4	31 3/4	1,111.65
A. Seventh & Wimer—Brick.....	6-24-25	25,000.00	9,460.00	15,540.00	11	29	526.78
B. Pasadena—Concrete.....	1- 1-25	1,300,000.00	286,000.00	1,014,000.00	11	39	26,000.00
C. Pasadena—Concrete.....	7- 1-27	70,652.75	15,732.34	54,920.41	8 1/2	31 1/2	1,743.50
C. Pasadena—Concrete.....	7- 1-28	270,488.56	43,204.63	227,283.93	8	42	5,411.52
D. Highland & Hollywood—Steel & Concrete.....	7- 1-28	514,024.31	77,097.14	436,927.17	7 1/2	42 1/2	10,280.64
F. Fresno—Concrete & Brick.....	1- 1-25	1,112,858.50	244,828.82	868,029.68	11	39	22,257.17
Fresno—Air Conditioning System.....	9- 1-36	70,137.27	0.00	70,137.27		15	1,558.61 (4 mo.)
G. Sixth & Alvarado—Brick.....	7- 3-28	33,458.32	7,206.93	26,251.39	7 1/2	32 1/2	807.73
H. Carthay Center—Brick.....	7- 3-28	26,081.45	4,256.46	21,824.99	7 1/2	42 1/2	513.53
I. Jefferson & Arlington—Concrete.....	7- 3-28	19,840.42	3,237.97	16,602.45	7 1/2	42 1/2	390.64
J. La Brea—Brick.....	7- 3-28	66,355.21	10,614.55	55,740.66	7 1/2	43	1,311.54
K. Belvedere Gardens—Brick.....	7- 3-28	10,125.00	1,652.38	8,472.62	7 1/2	42 1/2	199.35
L. Moneta—Brick.....	7- 3-28	12,225.35	2,369.28	9,856.07	7 1/2	32 1/2	303.26
M. Culver City—Brick.....	7- 3-28	15,576.00	3,386.66	12,189.34	7 1/2	32 1/2	375.06
P. San Fernando—Brick.....	7- 3-28	86,110.80	16,492.68	69,618.12	7 1/2	32 1/2	2,142.10
Q. Altadena—Brick.....	7- 3-28	40,882.45	7,853.12	33,029.33	7 1/2	32 1/2	1,016.28
R. Santa Barbara—Brick.....	7- 3-28	94,133.76	18,243.13	75,890.63	7 1/2	32 1/2	2,335.10
S. Dinuba—Brick.....	7- 3-28	18,542.60	3,593.58	14,949.02	7 1/2	32 1/2	459.97
Eighth & Olive—Brick.....	12- 1-35	29,704.50	0.00	29,704.50		35	848.70
Total of Buildings.....		\$6,103,084.10	\$1,461,321.57	\$4,641,762.53			\$131,668.60
Automobile.....	1934	850.00	425.00	425.00	2	2	212.50
Total.....		\$6,103,934.10	\$1,461,746.57	\$4,642,187.53			\$131,881.10

ANALYSIS OF DIVIDENDS PAID AND RECEIPTS AND EXPENDITURES ON ACCOUNT OF
CHANGES IN CORPORATION'S OBLIGATIONS AND CAPITAL STOCK
FOR CALENDAR YEAR 1936

Or fiscal year began 1936, and ended 1937
This schedule, together with green copy marked "Duplicate", must be filed with and as part of the corporation income and excess-profits tax return for the taxable year.

Print plainly corporation's name and business address (Date received)
Pacific Southwest Realty Company
(Name)
215 West Sixth Street
(Street and number)
Los Angeles Los Angeles California

List below all dividends paid during the taxable year, stating in each case the character of the dividend and entering the amounts in the proper columns respecting the taxable status of the dividends. If the total amount shown below differs from that reported in Schedule M, item 17, explain the difference at the end of this schedule. Dividends paid in treasury stock should be entered in item 2 and not in items 5 through 8. It is essential that dividends in which the medium of payment is elected by the shareholders be carefully reported in item 9, and correspondingly excluded from items 1 through 8.

Item No.	Character of Dividend	Taxable Dividends (1)	Nontaxable Dividends (2)	Total (3)
1. Cash		\$702,325.63	\$	\$702,325.63
2. Treasury stock				
3. Assets other than money or the corporation's own securities				
	(Explain character of each payment; use separate schedule if necessary.)			
4. Obligations of the corporation (bonds, notes, scrip, etc.)				
5. Common stock of the corporation to holders of preferred* stock				
6. Preferred* stock of the corporation to holders of preferred* stock				
7. Preferred* stock of the corporation to holders of common stock				
8. Common stock of the corporation to holders of common stock				
9. Optional—Medium of payment elected by the shareholders. (List below separately the amounts disbursed in each medium of payment):				
	Cash			
	Common stock			
	Other (specify character)			
10. Total (items 1 to 9)		\$702,325.63	\$	\$702,325.63
11. Dividends paid credit (item 29, page 1 of return)		479,489.44		479,489.44
12. Dividends carry-over (item 10 minus item 11)		222,836.19		222,836.19

*Preferred stock for this purpose should be considered as stock which is preferred as to either dividends or assets irrespective of formal designation.

SCHEDULE NO. 4

Pacific Southwest Realty Company, Los Angeles
Year 1936

SCHEDULE L—BALANCE SHEETS

	Beginning of Taxable Period	End of Taxable Period
Assets		
1. Cash	\$ 31,581.51	\$ 45,996.97
2. Notes receivable		1,255.00
3. Accounts receivable	1,453.11	1,216.80
7. Deferred charges:		
Refinancing expense	13,573.98	11,659.29
8. Capital assets:		
Buildings and equipment	6,049,432.45	6,095,957.80
Less reserves for		
depreciation	1,602,320.63	1,590,670.71
	<hr/>	<hr/>
	4,447,111.82	4,505,287.09
Land	5,285,756.06	5,245,399.47
11. Other assets:		
Real estate sales contract	581,854.19	
Construction		28,852.06
	<hr/>	<hr/>
12. Total Assets	<u>\$10,361,330.67</u>	<u>\$9,839,666.68</u>

	Beginning of Taxable Period	End of Taxable Period
Liabilities		
15. Notes payable (not secured by mortgage)	\$	\$3,560,000.00
16. Mortgages (including notes so secured)	4,210,000.00	4,058,000.00
18. Other liabilities:		
Rental security	739.00	1,401.50
Liability under real estate sales contract	650,000.00	
Amount payable for called and matured stock.....	900.00	5,205.00
Employees Unemployment insurance contributions		165.78
19. Capital stock:		
Preferred (less stock in treasury)	4,766,500.00	1,000,000.00
Common (less stock in treasury).....	No par—No stated value	No par—No stated value
20. Surplus and reserves.....	733,191.67	1,214,894.40
22. Total Liabilities.....	<u>\$10,361,330.67</u>	<u>\$9,839,666.68</u>

SCHEDULE NO. 5

Pacific Southwest Realty Company, Los Angeles
Year 1936

SCHEDULE M—RECONCILIATION OF NET INCOME
& ANALYSIS OF CHARGES IN SURPLUS

Line 11—Other credits to surplus:

(a) Excess depreciation taken in prior years.....	\$116,987.53	
(b) Improvements charged to expense during 1933, 1934 and 1935, which were disal- lowed or not claimed as deductions. Now capitalized per books.....		9,345.91
(c) Additional cost of Hollywood & Highland property caused by depreciation adjust- ment for the year 1930 by Revenue Agent		2,846.48
(d) Eighth and Olive Property Adjustments: Profit reported in 1929 from sale of property (RAR).....	\$33,548.25	
Selling expense in 1929 (RAR)	15,155.80	
Assessments charged to ex- pense in 1928, but disallowed by Revenue Agent.....	7,370.78	
Excess depreciation taken per books from 1929 to 1935, in- clusive	8,775.00	
Profit reported in 1935 from reacquirement of property.....	19,100.45	
	<hr/>	83,950.28
Less net award received in 1928 (see 1929 RAR).....	55,178.04	28,772.24
(e) Contributed surplus		525,000.00
Total.....		<hr/> \$682,952.16
		[109]

SCHEDULE NO. 6

Pacific Southwest Realty Company, Los Angeles

Year 1936

SCHEDULE OF 50% OR MORE OWNED CORPORATION

	Percentage of stock owned	Acquired	Return filed
Pacific Southwest Realty Company (of California), Los Angeles, California	100.	1923	California Sixth

[110]

RESOLUTION

Whereas, this corporation has now outstanding 37,665 unmaturred shares of its 6½% Cumulative Preferred Serial Stock of the par value of \$100.00 per share and of the aggregate par value of \$3,766,-500 represented by stock of the following series:

Series	Number of Shares	Redeemable On
H.....	1,260	July 1, 1936
I.....	1,260	July 1, 1937
J.....	1,530	July 1, 1938
K.....	1,530	July 1, 1939
L.....	1,530	July 1, 1940
M.....	1,800	July 1, 1941
N.....	2,070	July 1, 1942
O.....	2,070	July 1, 1943
P.....	2,340	July 1, 1944
Q.....	2,610	July 1, 1945
R.....	2,745	July 1, 1946
S.....	3,015	July 1, 1947
T.....	3,285	July 1, 1948
U.....	3,555	July 1, 1949
V.....	4,005	July 1, 1950
W.....	3,060	July 1, 1951

and

Whereas, Article Fourth of the Certificate of Incorporation of this corporation as amended provides that the whole or any part of the preferred stock of this corporation may be redeemed on any dividend date upon the payment of the par value thereof plus the "Fixed redemption premium" per share, plus all unpaid, accrued or accumulated dividends thereon, and that such redemption shall be by such method as shall be provided from time to time by

resolution of the board of directors of this corporation; and

Whereas, said 6½% Cumulative Preferred Serial Stock is of the par value of \$100.00 per share and the accumulated dividends to and including October 1, 1935, on said stock have been paid, and the "fixed redemption premium" payable on the redemption of said stock is 5% of the par value of said stock, and the redemption price of said stock is \$105.00 per share; and

Whereas, it is the sense of this board of directors that it is for the best interests of this corporation that all stock comprising Series I to W, both inclusive, of said 6½% Cumulative Preferred Serial Stock above referred to, be redeemed; and

Whereas, it appears that the assets of the corporation remaining after such redemption will be sufficient to pay any debts of the corporation, the payment of which has not been otherwise provided for; [113]

Now, Therefore, Be It Resolved, That all of the 6½% Cumulative Preferred Serial Stock issued by this corporation under Series I to W, both inclusive, be redeemed and said stock is hereby called for redemption on January 1, 1936, at the fixed redemption price thereof, namely, \$105.00 per share plus the amount of the accrued dividends thereon at the rate of 6½% per annum from October 1, 1935, to said redemption date, upon presentation and surrender of the certificates for said stock at the office of the corporation at Room 1000 Pacific Southwest

Building, 215 West Sixth Street, Los Angeles, California;

Further Resolved, That the President or any Vice President, and the Secretary or any Assistant Secretary of this corporation shall give at least thirty days' notice of such redemption by mail at their respective addresses as shown on the books of the corporation to the stockholders of record on the books of the corporation whose stock is to be redeemed, and shall also give notice by publication in the Los Angeles Daily Journal, it being a newspaper of general circulation published in the City of Los Angeles, State of California, and in The Recorder, it being a newspaper of general circulation published in the City of San Francisco, State of California, once a week for at least thirty days prior to January 1, 1936, the date hereby fixed for such redemption, and that said notice shall be in substantially the following form:

Pacific Southwest Realty Company

Los Angeles

Notice of Redemption

To the Holders of Series I to W, Both Inclusive, of the 6½% Cumulative Preferred Serial Stock of Pacific Southwest Realty Company

Notice Is Hereby Given that pursuant to the provisions of its Certificate of Incorporation as amended and to a resolution of its board of directors adopted at a meeting thereof duly held

on November 20, 1935, Pacific Southwest Realty Company, a Delaware corporation, has called for redemption on January 1, 1936, at the office of said corporation at Room 1000, Pacific Southwest Building, 215 West Sixth Street, Los Angeles, California, its outstanding 6½% Cumulative Preferred Serial Stock of Series I to W, both inclusive, at the redemption price of \$105 per share plus the amount of the dividend accrued thereon from October 1, 1935, to said date fixed for redemption.

Certificates for said preferred stock should be presented at or forwarded to Pacific Southwest Realty Company, Room 1000 Pacific Southwest Building, 215 West Sixth Street, Los Angeles, California, at any time on or after January 1, 1936

From and after January 1, 1936, the date fixed as the date of redemption, all dividends on such stock so called for redemption shall cease to accrue and from and after said date all the rights of the holders thereof as stockholders of this corporation, except the right to receive such redemption price, shall cease and determine. [114]

Dated _____, 1935.

PACIFIC SOUTHWEST
REALTY COMPANY,

By _____

Its Vice-President

By _____

Its Assistant Secretary

Further Resolved, That of said redemption price of said preferred stock, the amount of \$100.00 per share shall be paid out of capital of this corporation and the balance of said redemption price shall be paid out of surplus of this corporation.

Further Resolved, That all numbers of the certificates of said preferred stock of this corporation so redeemed shall be appropriately cancelled on the books of this corporation by the Registrar and said stock evidenced thereby shall not be reissued.

Further Resolved, That the President or any Vice President and the Secretary or any Assistant Secretary be, and they are hereby authorized, directed and empowered to do and perform any and all acts and things, to give any and all notices, to make any and all payments and to execute any and all instruments, documents or certificates which in their sole judgment or discretion they may deem necessary or advisable to effect the redemption of said stock.

Further Resolved, That the President or any Vice President and the Secretary or any Assistant Secretary upon such redemption being made, are hereby authorized, directed and empowered to execute and file a certificate of such redemption pursuant to the provisions of Section 27 of the Delaware Corporation Laws, and otherwise to take any and all steps necessary or convenient to effect said redemption.

I, George C. Cook, Assistant Secretary of the Pacific Southwest Realty Company, hereby certify that the above and foregoing is a full, true and correct copy of a Resolution unanimously adopted by the Board of Directors of said Company at a regu-

lar meeting duly and regularly called and held November 20, 1935, at which meeting a quorum was present and voted; and that said Resolution has not been repealed or amended and that the same is still in full force and effect.

Dated: March 6, 1937.

(Seal)

GEORGE C. COOK,

Assistant Secretary. [115]

RESOLUTION

Resolved: That this corporation pay the regular quarterly dividend on its 6½% Cumulative Preferred Serial Stock, on January 1, 1936 to stockholders of record December 21, 1935, amounting to \$61,205.63, and that the Stock Transfer Books of this corporation be closed from said December 21, 1935 to said dividend payment date.

I, George C. Cook, Assistant Secretary of the Pacific Southwest Realty Company, hereby certify that the above and foregoing is a full, true and correct copy of a Resolution unanimously adopted by the Board of Directors of said Company at a regular meeting duly and regularly called and held November 20, 1935, at which meeting a quorum was present and voted; and that said Resolution has not been repealed or amended and that the same is still in full force and effect.

Dated: March 6, 1937.

(Seal)

GEORGE C. COOK,

Assistant Secretary. [116]

RESOLUTION

Resolved: That this corporation pay the regular quarterly dividend on its 5½% Cumulative Preferred Serial Stock on January 1, 1936, to stockholders of record December 21, 1935, in the amount of 13,750.00 and that the Stock Transfer Books of this corporation be closed from said December 21, 1935 to said dividend payment date.

I, George C. Cook, Assistant Secretary of the Pacific Southwest Realty Company, hereby certify that the above and foregoing is a full, true and correct copy of a Resolution unanimously adopted by the Board of Directors of said Company at a regular meeting duly and regularly called and held November 20, 1935, at which meeting a quorum was present and voted; and that said Resolution has not been repealed or amended and that the same is still in full force and effect.

Dated: March 6, 1937.

(Seal)

GEORGE C. COOK,

Assistant Secretary. [117]

RESOLUTION

Resolved: That this corporation pay the regular quarterly dividend on its 6½% Cumulative Preferred Serial Stock on April 1, 1936, to stockholders of record March 21, 1936, amounting to \$2,047.50 and that the Stock Transfer Books of this Corporation be closed from said March 21, 1936, to said dividend payment date.

I, George C. Cook, Assistant Secretary of the Pacific Southwest Realty Company, hereby certify that the above and foregoing is a full, true and correct copy of a Resolution unanimously adopted by the Board of Directors of said Company at a regular meeting duly and regularly called and held March 18, 1936, at which meeting a quorum was present and voted; and that said Resolution has not been repealed or amended and that the same is still in full force and effect.

Dated: March 6, 1937.

(Seal)

GEORGE C. COOK,

Assistant Secretary. [118]

RESOLUTION

Resolved: That this Corporation pay the regular quarterly dividend on its 5½% Cumulative Preferred Serial Stock on April 1, 1936, to stockholders of record March 21, 1936, amounting to 13,750.00 and that the Stock Transfer Books of this Corporation be closed from said March 21, 1936 to said dividend payment date.

I, George C. Cook, Assistant Secretary of the Pacific Southwest Realty Company, hereby certify that the above and foregoing is a full, true and correct copy of a Resolution unanimously adopted by the Board of Directors of said Company at a regular meeting duly and regularly called and held March 18, 1936, at which meeting a quorum was present and voted; and that said Resolution has not

been repealed or amended and that the same is still in full force and effect.

Dated: March 6, 1937.

(Seal)

GEORGE C. COOK,

Assistant Secretary. [119]

RESOLUTION

Resolved: That this Corporation pay the regular quarterly dividend on its 6½% Cumulative Preferred Serial Stock on July 1, 1936, to Stockholders of record, June 22, 1936 amounting to \$2047.50 and that the Stock Transfer Books of this Corporation be closed from said June 22, 1936 to said dividend payment date.

I, George C. Cook, Assistant Secretary of the Pacific Southwest Realty Company, hereby certify that the above and foregoing is a full, true and correct copy of a Resolution unanimously adopted by the Board of Directors of said Company at a regular meeting duly and regularly called and held June 17, 1936, at which meeting a quorum was present and voted; and that said Resolution has not been repealed or amended and that the same is still in full force and effect.

Dated: March 6, 1937.

(Seal)

GEORGE C. COOK,

Assistant Secretary. [120]

RESOLUTION

Resolved: That this Corporation pay the regular quarterly dividend on its 5½% Cumulative Preferred Serial Stock on July 1, 1936 to stockholders of record June 22, 1936 amounting to \$13,750.00 and the Stock Transfer Books of this Corporation be closed from said June 22, 1936 to said dividend payment date.

I, George C. Cook, Assistant Secretary of the Pacific Southwest Realty Company, hereby certify that the above and foregoing is a full, true and correct copy of a Resolution unanimously adopted by the Board of Directors of said Company at a regular meeting duly and regularly called and held June 17, 1936, at which meeting a quorum was present and voted; and that said Resolution has not been repealed or amended and that the same is still in full force and effect.

Dated: March 6, 1937.

(Seal)

GEORGE C. COOK,

Assistant Secretary. [121]

RESOLUTION

Resolved, that this Corporation pay the regular quarterly dividend of its 5½% Cumulative Preferred Serial Stock on October 1st, 1936, to stockholders of record, September 22, 1936, amounting to \$13,750.00 and the Stock Transfer Books of this

Corporation be closed from said September 22, 1936, to said dividend payment date.

I, George C. Cook, Assistant Secretary of the Pacific Southwest Realty Company, hereby certify that the above and foregoing is a full, true and correct copy of a Resolution unanimously adopted by the Board of Directors of said Company at a regular meeting duly and regularly called and held September 16, 1936, at which meeting a quorum was present and voted; and that said Resolution has not been repealed or amended and that the same is still in full force and effect.

Dated: March 6, 1937.

(Seal)

GEORGE C. COOK,

Assistant Secretary. [122]

RESOLUTION

Whereas, the dividends upon all of the now issued and outstanding preferred stock of Pacific Southwest Realty Company for all past dividend periods have been declared and paid, and a preferred dividend for the current dividend period payable January 1, 1937, has been declared and the amount thereof set aside; and

Whereas, an amount equal to the amount of two full yearly dividends on the now issued and outstanding preferred stock of the corporation has been set aside out of the earned surplus of the corporation and transferred to "Surplus Reserve for Dividend on Preferred Stock"; and

Whereas after payment of said dividends and the setting aside of said amounts, there remains an earned surplus available for dividends on the common stock; and

Whereas, out of the net earnings of the corporation for the year 1936, it is estimated that there will remain, before the payment of any dividend on the common stock of the corporation, a net profit subject to the surtax on undistributed profits amounting to approximately \$365,000.00.

Resolved, that a cash dividend of \$8.00 per share on the outstanding common stock of this corporation, amounting to \$400,000.00, be and the same is hereby declared out of the earned surplus of the corporation, payable December 18, 1936, to the common stockholders of the corporation in proportion to their respective holdings of common stock as they appear of record at the close of business on the 17th day of December, 1936. [123]

I, George C. Cook, Assistant Secretary of the Pacific Southwest Realty Company, hereby certify that the above and foregoing is a full, true and correct copy of a Resolution unanimously adopted by the Board of Directors of said Company at a regular meeting duly and regularly called and held December 16, 1936, at which meeting a quorum was present and voted; and that said Resolution has not been repealed or amended and that the same is still in full force and effect.

Dated: March 6, 1937.

(Seal)

GEORGE C. COOK,

Assistant Secretary. [124]

POWER OF ATTORNEY

Know All Men by These Presents:

That we, the undersigned, on behalf of the Pacific Southwest Realty Co., a corporation, having its principal place of business in the city of Los Angeles, State of California, have made, constituted and appointed, and do hereby make, constitute and appoint, Claude I. Parker and/or Thos. R. Benner, of Los Angeles, the true and lawful attorney or agent for the corporation and in its name and on its behalf to act in all matters pertaining to any Federal Taxes now assessed, proposed to be assessed, or which may hereafter be assessed against said corporation, or the consideration and determination of which may be pending or may hereafter be pending in the Treasury Department at Washington, D. C., or in any Division, Bureau or Section thereof, whether in or out of the said City of Washington; giving and granting unto said attorney or agent full power and authority to do and perform all and every act or thing whatsoever requisite and necessary to be done in and about the premises as fully, to all intents and purposes, as any of the officers of the corporation might do if personally present, with full power of substitution or revocation, hereby ratifying and confirming all that said attorney or agent, or his substitute or substitutes shall lawfully do or cause to be done by virtue of these presents, hereby specifically revoking all prior powers of attorney.

In Witness Whereof, we have hereunto set our hand and seal this 28 day of January, 1931.

PACIFIC SOUTHWEST
REALTY CO.,

By (Signed) W. B. STRINGFELLOW,
Vice-President.

(Corporate Seal)

(Seal)

Attest: (Signed) WM. DOWNEY,
Secretary of the Pacific
Southwest Realty Co.

State of California

County of Los Angeles—ss.

On This 28th day of January, 1931, before me, a Notary Public in and for said State and County, personally appeared W. B. Stringfellow, known to me to be the Vice President, and Wm. Downey, known to me to be the Secretary of the Pacific Southwest Realty Co., the Corporation that executed the within Instrument, known to me to be the persons who executed the within Instrument, on behalf of the Corporation herein named, and acknowledged to me that such Corporation executed the same, for the purposes therein stated.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Seal) (Signed) DOROTHY C. REYNOLDS,
Notary Public in and for the County of Los Angeles, State of California.

My commission expires June 13, 1933. [125]

SUBSTITUTE POWER OF ATTORNEY

Know All Men by These Presents:

That I, Claude I. Parker, of the City of Los Angeles, State of California, in accordance with the authority conferred upon me, in that certain power of attorney given to me by Pacific Southwest Realty Co. bearing date of January 28, 1931, hereby constitute and appoint Bayley Kohlmeier of the City of Los Angeles, California, to act as my substitute attorney, or agent giving unto said Bayley Kohlmeier full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully to all intents and purposes as I might or could do if personally present.

/s/ CLAUDE I. PARKER.

State of California

County of Los Angeles—ss.

On this 28th day of February, 1939, before me, a Notary Public in and for said State and County, personally appeared Claude I. Parker, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged that he executed the same.

Witness my hand and official seal.

(Seal) /s/ M. LeSAGE,

Notary Public in and for the County of Los Angeles, State of California. [126]

1936 RETURN

OF

CAPITAL-STOCK TAX

For Year Ending June 30, 1936

1097 DUPLICATE

DOMESTIC CORPORATIONS

(See, 105, Revenue Act of 1936, 49 Stat. 1000, 1001, 1002)

This return must be filed, in triplicate, with the collector of Internal Revenue for your district on or before July 31, 1936, and the tax must be paid on or before that date.

To be stamped by collector, showing district and date received

- Name Pacific Southwest Realty Company
(Print name of corporation, paid-up capital, etc.)
- Address 215 West Sixth Street, Los Angeles, California
(The address must be that of the principal place of business.)
- Name of parent company, if any Security-First National Bank of Los Angeles
District filed 6
- Name of subsidiary, if any Pac. Southwest Realty Co. (Calif.) shares held
(If more than one, state list and state number of shares held by each.) District filed 6
- Nature of business in detail Owns and operates improved real estate
- Incorporated or organized in State of Delaware Month May Day 31 Year 1923
- Was a capital-stock tax return filed for the preceding taxable year ended June 30, 1935? Yes
state the name (District filed)

8. DECLARED VALUE OF ENTIRE CAPITAL STOCK \$ 9,500,000
(The value declared must be definite and unqualified. A value must be declared in every case regardless of whether exemption from tax is claimed.)

9. EXEMPTIONS.—The Act provides for an exemption from the tax only on the grounds indicated below. Corporations claiming exemption must (1) declare a value for the capital stock under item 8, (2) check the appropriate block under item 9 showing the basis of the claim, and (3) submit with the return a full statement of the evidence specified under the block checked.

- ☐ Corporation exempt from income tax under section 101, Revenue Act of 1931. (1) State under which direction of section 101 (2) Furnish information required by instruction 1
- ☐ Insurance company subject to tax under section 201, 204, or 207, Revenue Act of 1931. State which section
- ☐ Corporation not doing business. (1) Furnish information required by instruction 6 (2) Declare value of capital stock in item 8 above.

CORPORATION OF TAX

FOR EACH TAXAYER

AMOUNT

10. Declared value (must be identical figure entered in item 8)	\$ 9,500,000.00	\$
11. Tax at rate of <u>1.00%</u> or each full \$1,000 in item 8	95,000.00	
12. Penalty for delinquency in filing returns (see inst. 7)		
13. Interest at 6 percent per annum beginning August 1, 1936		
14. Total tax, penalty, and interest	\$ 95,000.00	

15. State amounts of outstanding capital stock and surplus as of date of the close of income tax taxable year used in declaring value for capital stock. (If nonstock organization, so indicate and attach statement of net worth.)

	NUMBER OF SHARES	PAR VALUE PER SHARE	
Capital stock: Preferred	47,676	100.00	4,767,400.00
Common	50,000	No stated value	
Capital or paid-in surplus	XXXXXXXXXX	XXXXXXXXXX	
Surplus reserves	XXXXXXXXXX	XXXXXXXXXX	
Surplus and undivided profits	XXXXXXXXXX	XXXXXXXXXX	733,191.67

We, the undersigned H. B. Stringfellow (Name of president, vice president, or other executive officer) Vice President
and Wm. Downey (Name of treasurer, assistant treasurer, or chief accounting officer) Asst. Secretary of the corporation

return is made, being severally duly sworn, each for himself deposes and swears that this return, including any accompanying documents, has been examined by him and is, to the best of his knowledge and belief, a true and complete return, made in good faith, for the taxable year stated, pursuant to the Revenue Act of 1936 and the Regulations issued thereunder.

Sworn to and subscribed before me this 30 day of July, 1936

NOTARIAL SEAL

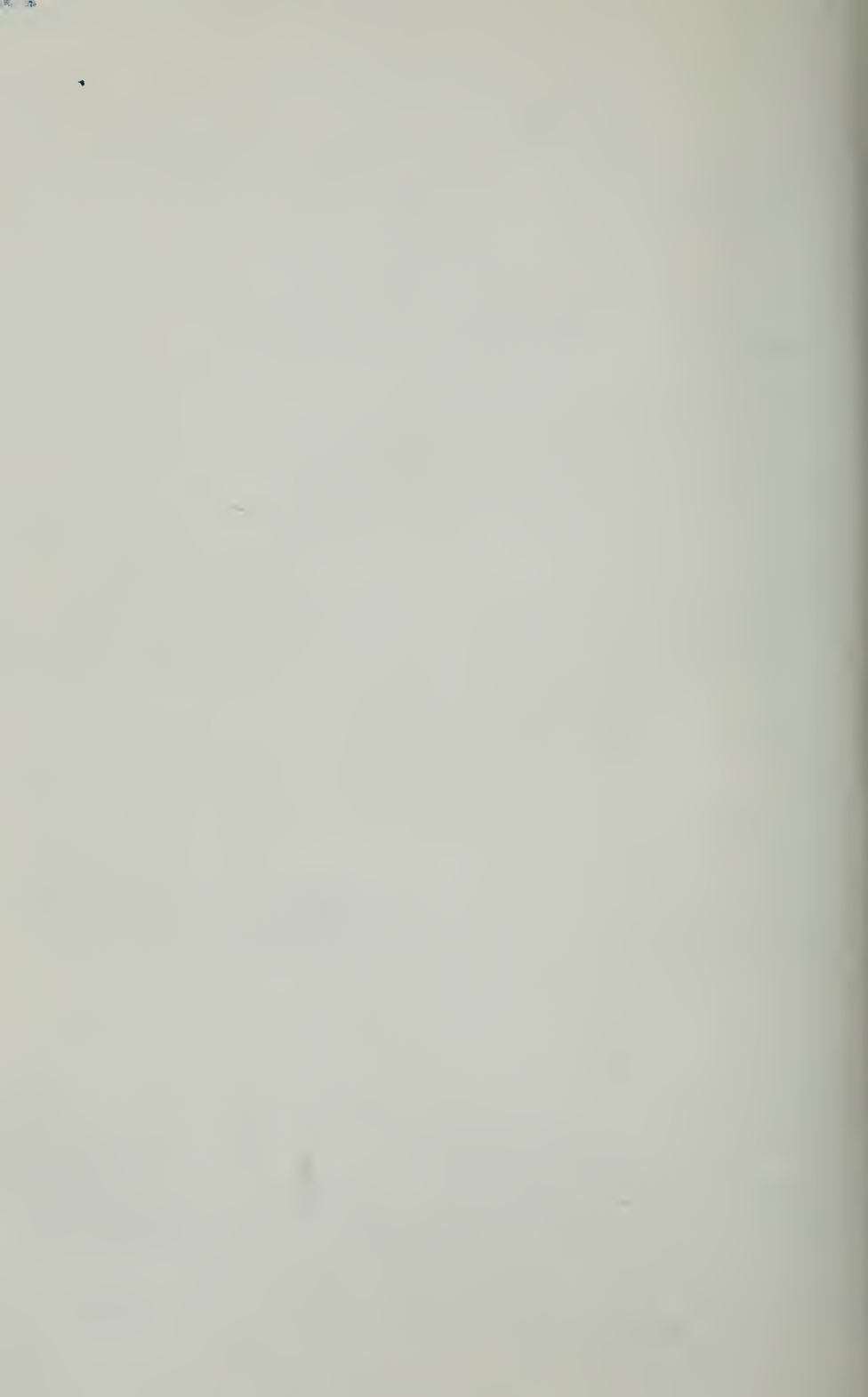
CORPORATE SEAL

Vice President

Asst. Secretary

Not a Corporation on June 15, 1937

1-7717



1937

UNITED STATES

CORPORATION INCOME AND EXCESS-PROFITS TAX RETURN

1937

Treasury Department (FORM 1120) Internal Revenue Service

For Calendar Year 1937 or Fiscal Year beginning 1937, and ended 1938

PRINT PLAINLY CORPORATION'S NAME AND ADDRESS

11 102605 Pacific Southwest Realty Company (Name)
215 West Sixth Street (Street and number)
Los Angeles Los Angeles California (City) (County) (State)
JOINT B-2
Kind of business: LUMBER OPERATOR, IMPORTER, DEALER

File No. 1, 5
Serial No. 10,1501
District (County's Name)
Clerk Clerk M. G.
Post Person

EXCESS-PROFITS TAX COMPUTATION

Item No.		Rate	Amount of Tax
1. Net income for excess-profits computation (Item 28, Schedule A)	\$ 401,921 26		
2. State value of capital stock as declared in your capital stock tax return for the year ended June 30, 1937 (or in your capital stock tax return for the year ended June 30, 1936, if your income tax fiscal year began in 1937 and ended on or after July 31, 1938)	\$ 6,180,120.52		
3. Enter here 10 percent of Item 2	\$ 618,012 05		
4. Dividends received credit (85 percent of Schedule F, column 3)	\$ 618,012 05		
5. Excess subject to excess-profits tax (Item 1 minus Items 3 and 4)	\$ None		
6. Amount taxable at 5 percent (8 percent of Item 2, but not more than Item 5)		5%	
7. Balance taxable at 12 percent (Item 5 minus Item 6)		12%	
8. Total excess-profits tax			\$ None

NORMAL TAX COMPUTATION

9. Net income for income tax computation (Item 31, Schedule A)	\$ 401,921 26		
10. Dividends received credit (85 percent of Schedule F, column 3)	\$ 618,012 05		
11. Balance subject to normal tax (Item 9 minus Item 10 or 11)	\$ 401,921 26		
12. Tax on portion of Item 11 not in excess of \$5,000	\$ 2,000 00	8%	\$ 160 00
13. Tax on portion of Item 11 in excess of \$5,000 and not in excess of \$15,000	\$ 13,000 00	11%	\$ 1,430 00
14. Tax on portion of Item 11 in excess of \$15,000 and not in excess of \$40,000	\$ 25,000 00	12%	\$ 3,000 00
15. Tax on portion of Item 11 in excess of \$40,000	\$ 341,921 26	15%	\$ 51,288 19
17. Total normal tax in Items 12 to 15			\$ 59,128 19
NORMAL TAX ON CORPORATIONS NOT SURVEYED OR GRANTED NORMAL TAX RATES (to be used in box of the normal tax rates above)			
16. Items 15 above			
18. Banks and trust companies (see Instruction II)		15%	
19. Insurance companies		15%	
20. Corporations entitled to the benefits of section 261 of the Revenue Act of 1936		15%	
21. Corporations organized under the China Trade Act, 1922		15%	
22. Foreign corporations engaged in trade or business within the United States or having an office or place of business therein		22%	

UNDISTRIBUTED PROFITS SURTAX COMPUTATION

(See Instruction III regarding corporations exempt from surtax)

23. Net income for income tax computation (Item 31, Schedule A)	\$ 401,921 26		
24. Normal tax (Item 17 above)	\$ 59,128 19		
25. Credit for holding company affiliate or national mortgage association (see Instruction III (d) and (e))	\$ 59,128 19		
26. Adjusted net income (Item 26 minus Items 24 and 25)	\$ 342,793 07		
27. Dividends paid credit (See 13, Schedule M)	\$ 572,834 19		
28. Credit for contracts restricting dividend payments (see Instr. III)	\$ 572,834 19		
29. Undistributed net income (Item 26 minus Items 27 and 28)	\$ None		
30. Portion of Item 29 taxable at 7%; 84,000 or 10% of Item 26, whichever is greater (but not more than Item 29)		7%	
31. Portion of Item 29 taxable at 12%; 10% of Item 26 (but not more than Item 29 minus Item 30)		12%	
32. Portion of Item 29 taxable at 17%; 20% of Item 26 (but not more than Item 29 minus Items 30 and 31)		17%	
33. Portion of Item 29 taxable at 22%; 20% of Item 26 (but not more than Item 29 minus Items 30 to 32)		22%	
34. Portion of Item 29 taxable at 27%; (Item 26 minus Items 30 to 33)		27%	
35. Total surtax in Items 30 to 34			\$ None
36. Total normal tax and surtax (Item 17 plus Item 35, or Item 18, 19, 20, 21, or 22)			\$ 59,128 19
37. Less: Credit for income tax of a foreign country or U. S. possession allowed a domestic corporation (see Instruction IV)			\$ 59,128 19
38. Balance of tax (Item 36 minus Item 37)			\$ None
39. Excess-profits tax (Item 8 above)			\$ None
40. Total tax due (Item 38 plus Item 39)			\$ 59,128 19

NOTE.—One form marked "DUPLICATE COPY" must be filed with this original return (916 will be needed if a duplicate copy is not filed).

GROSS INCOME			
1. Income from:			
(a) Salaries, wages, etc.			
(b) Dividends, interest, etc.			
(c) Royalties			
(d) Capital gain or loss			
(e) Other income			
2. Gross profit from sales of:			
(a) Commodities			
(b) Minerals			
(c) Intellectual property			
(d) Other			
3. Gross profit from sales of:			
(a) Commodities			
(b) Minerals			
(c) Intellectual property			
(d) Other			
4. Interest on loans, notes, mortgages, bonds, bank deposits, etc.			
5. Dividend or obligation of the United States (from Schedule B, line 19 (a))			
6. Dividends			
7. Royalties			
8. Capital gain or loss (from Schedule D). (If a net loss, do not enter over \$1,000)			
9. Dividends (from Schedule F)			
10. Other income (state nature of income) Schedule No. 1 attached			
11. Total income in items 3, and 6 to 10, inclusive			\$ 1,332,634 20
DEDUCTIONS			
12. Compensation of officers (from Schedule G)			
13. Salaries and wages (not deducted elsewhere)			
14. Rent			
15. Repairs			
16. Bad debts (from Schedule H)			
17. Interest			
18. Taxes (from Schedule I). (Do not include Federal excess-profits tax)			
19. Contributions or gifts (from Schedule J)			
20. Losses by fire, storm, etc. (Submit schedule, see Instruction 23)			
21. Depreciation (from Schedule K)			
22. Depletion of mines, oil and gas wells, timber, etc. (Submit schedule, see Instruction 23)			
23. Other deductions authorized by law (from Schedule L)			
24. Total deductions in items 12 to 23, inclusive			
25. Net income for excess-profits tax computation (Item 11 minus Item 24)			\$ 937,912 94
26. Less: Federal excess-profits tax (see Instruction 29)			\$ 401,921 26
27. Interest on obligations of the United States (Item 8, above)			
28. Net income for income tax computation (Item 25 minus Item 26 and 27)			\$ 401,921 26

Schedule B.—RECONCILIATION OF NET INCOME AND ANALYSIS OF EARNED SURPLUS AND UNDIVIDED PROFITS

1. Total distributions to stockholders charged to earned surplus during the taxable year	\$ 350,000 00	17. Earned surplus and undivided profits as shown by balance sheet at close of preceding taxable year (Schedule N)	\$ 689,894 40
2. Contributions or gifts (excess over 8 percent limitation)		18. Net income for income tax computation (Item 28, Schedule A)	401,921 26
3. Federal income taxes	\$3,251 08	Not taxable in whole or in part (a) exempt income	
4. Income taxes of United States possessions or foreign countries if claimed as a credit in whole or in part in Item 37, page 1 of return		(a) Interest on:	
5. Federal taxes paid on tax-free covenant bonds		(1) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions	
6. Special improvement taxes tending to increase the value of the property assessed		(2) Obligations of United States issued on or before September 1, 1917, Treasury Notes, Treasury Bills, and Treasury Certificates of Indebtedness	
7. Replacements, renewals and capital expenditures charged to expenses on the books		(3) United States Savings Bonds and Treasury Bonds owned in the principal amount of \$4,000 or less	
8. Insurance premiums paid on the life of any officer or employee where the corporation is directly or indirectly a beneficiary		(4) United States Savings Bonds and Treasury Bonds owned in the principal amount of over \$4,000	
9. Unallowable interest incurred in purchasing or carrying exempt interest obligations		(5) Obligations of instrumentalities of the United States	
10. Excess of capital loss, if any, over amount allowable as a deduction in Item 11, Schedule A		(6) Other non-taxable income (itemize):	
11. Additions to surplus reserves (list each reserve separately):		(1)	
(a)		(2)	
(b)		(3)	
(c)		(4)	
12. Other unallowable deductions:		20. Charges against surplus reserves deducted from income in the years (itemize):	
(a)		(a)	
(b)		(b)	
(c)		(c)	
13. Adjustments for tax purposes not recorded on books (itemize):		21. Adjustments for tax purposes not recorded on books (itemize):	
(a)		(a) Unamortized Discount	
(b)		(b) on Debt Retired	
(c)		(c)	
14. Sundry debits to earned surplus (itemize):		22. Sundry credits to earned surplus (itemize):	
(a)		(a)	
(b)		(b)	
(c)		(c)	
15. Earned surplus and undivided profits as shown by balance sheet at close of the taxable year (Schedule N)	689,894 97	(d)	
16. Total of lines 1 to 15	\$ 1,123,091 05	23. Total of lines 17 to 22	

NOTE.—Attach to this return and mark as Schedule B-1, B-2, etc., analyses of surplus reserves, if any, as shown by the balance sheets (Schedule N), additions to which are not deductible for income and excess-profits tax purposes.

	2011	2012	2013	Total	
Francoise Tax - California	\$2,115	26	Social Security Tax	\$ 1,424	66
Francoise Tax - Delaware	.50	00	Unemployment Ins. Tax - Calif.	2,907	84
Personal Property Tax	8	58			
Real Property Tax	101,745	71			
Capital Stock Tax - Federal	6,180	00			
			Total taxes payable	\$ 190,738	07

Schedule J.—CONTRIBUTIONS OR GIFTS (See instructions 22)

Number and Name of Organization	Address	Name and Title	Signature and Title	Address
1. American Association of University Professors	1200 16th St. N.W.	Dr. J. Edgar Hoover	Director	Washington, D.C.
2. American Bar Association	500 North Dearborn St.	Mr. J. Edgar Hoover	Director	Chicago, Ill.
3. American Medical Association	535 North Dearborn St.	Mr. J. Edgar Hoover	Director	Chicago, Ill.
4. American Psychological Association	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
5. American Psychiatric Association	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
6. American Society of Criminology	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
7. American Society of Forensic Psychologists	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
8. American Society of Legal Medicine	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
9. American Society of Psychiatry and Law	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
10. American Society of Forensic Psychiatry	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
11. American Society of Forensic Psychology	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
12. American Society of Forensic Medicine	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
13. American Society of Forensic Science	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
14. American Society of Forensic Pathology	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
15. American Society of Forensic Anthropology	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
16. American Society of Forensic Dentistry	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
17. American Society of Forensic Odontology	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
18. American Society of Forensic Radiology	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
19. American Society of Forensic Photography	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
20. American Society of Forensic Linguistics	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
21. American Society of Forensic Handwriting	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
22. American Society of Forensic Document Examination	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
23. American Society of Forensic Ballistics	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
24. American Society of Forensic Firearms Examination	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
25. American Society of Forensic Chemistry	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
26. American Society of Forensic Toxicology	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
27. American Society of Forensic Microbiology	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
28. American Society of Forensic Botany	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
29. American Society of Forensic Zoology	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
30. American Society of Forensic Entomology	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
31. American Society of Forensic Archaeology	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
32. American Society of Forensic Geology	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
33. American Society of Forensic Meteorology	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
34. American Society of Forensic Climatology	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
35. American Society of Forensic Oceanography	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
36. American Society of Forensic Atmospheric Science	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
37. American Society of Forensic Space Science	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
38. American Society of Forensic Planetary Science	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
39. American Society of Forensic Solar Science	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
40. American Society of Forensic Lunar Science	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
41. American Society of Forensic Martian Science	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
42. American Society of Forensic Venusian Science	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
43. American Society of Forensic Jovian Science	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
44. American Society of Forensic Saturnian Science	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
45. American Society of Forensic Uranian Science	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
46. American Society of Forensic Neptunian Science	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
47. American Society of Forensic Plutonian Science	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
48. American Society of Forensic Charonian Science	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
49. American Society of Forensic Eridanian Science	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
50. American Society of Forensic Aquean Science	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
51. American Society of Forensic Tellurian Science	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
52. American Society of Forensic Geocentric Science	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
53. American Society of Forensic Heliocentric Science	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
54. American Society of Forensic Galactocentric Science	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
55. American Society of Forensic Cosmological Science	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
56. American Society of Forensic Astrophysical Science	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
57. American Society of Forensic Cosmological Science	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.
58. American Society of Forensic Astrophysical Science	1200 16th St. N.W.	Mr. J. Edgar Hoover	Director	Washington, D.C.

Schedule K—DEPRECIATION (See Instruction 24)

[illegible]

Schedule L—OTHER DEDUCTIONS (See instruction 26)

Schedule No. 2 Attached

Schedule M.—DISTRIBUTIONS TO STOCKHOLDERS AND DIVIDENDS PAID CREDIT (See Instruction III)

Distributions Out of Earnings or Profits of the Taxable Year or Out of Earnings or Profits Accumulated Since February 28, 1913 (Indicate date paid)		1. Taxable Distributions		2. Nontaxable Distributions	
1. Cash		\$	350,000.00		
2. Assets other than cash or the corporation's own securities: (See notes 1 and 3.) (Indicate nature of assets.)					
3. Treasury stock. (See notes 1 and 3.)					
4. Obligations of the corporation (bonds, notes, scrip, etc.). (See notes 3 and 5)					
5. Common stock of the corporation distributed to holders of common stock. (See notes 3 and 5)					
6. Preferred stock of the corporation distributed to holders of common stock. (See notes 2, 4, and 5)					
7. Common stock of the corporation distributed to holders of preferred stock. (See notes 2, 4, and 5)					
8. Preferred stock of the corporation distributed to holders of preferred stock. (See notes 2, 4, and 5)					
9. Optional—Medium of payment elected by stockholders: (a) Cash (b) Common stock. (See notes 3 and 5) (c) Other. (See note 3.) (Specify nature)					
10. Totals of Items 1 to 9		\$	350,000.00		
DIVIDENDS PAID CREDIT					
11. Taxable distributions (line 10, column 1)		\$	350,000.00		
12. Dividend carry-over from preceding taxable year (attach schedule of computation)		\$	0.00		
13. Dividends paid credit (total of lines 11 and 12). (Enter on Item 27, page 1)		\$	350,000.00		
14. Adjusted net income (Item 26, page 1)		\$	350,000.00		
15. Dividend carry-over (line 13 minus line 14)		\$	0.00		
RECONCILIATION					
16. Total distributions out of earnings or profits of the taxable year or out of earnings or profits accumulated since February 28, 1913 (total of columns 1 and 2, line 10)		\$	350,000.00		
17. Total distributions charged to earned surplus and undivided profits, as shown on line 1, Schedule B		\$	350,000.00		
18. Total distributions during the taxable year regardless of source		\$	350,000.00		

In case the amounts entered on lines 16, 17, and 18 are not the same, explain difference:

NOTES:

1. Enter the lesser of the two following amounts determined as of the time of distribution: (a) The adjusted basis in the hands of the corporation provided in section 113 of the Revenue Act of 1936, as amended; or (b) the fair market value.
2. Enter the amount of the fair market value at time of distribution.
3. Enter the lesser of the two following amounts determined as of the time of distribution: (a) Face value; or (b) fair market value.
4. Preferred stock for this purpose should be considered as stock owned by the corporation as to which dividends or assets in preference of common stock are payable in the purchase of rights to purchase stock or other obligations of the corporation should be entered in the line applicable to the assets, stocks or other obligations for which rights were distributed.

	For the Year		End of Taxable Year	
	Amount	Total	Amount	Total
ASSETS				
1. Cash.....		\$ 45,100 97		\$ 124,064 90
2. Notes receivable.....	\$ 1,800 00		\$ 347 60	
3. Accounts receivable.....	1,210 00		341 37	
(a) Total of lines 2 and 3.....	2,471 00		1,496 87	
(b) Less reserve for bad debts.....		2,471 00		1,496 87
4. Inventories:				
(a) Raw materials.....	\$		\$	
(b) Work in process.....				
(c) Finished goods.....				
(d) Supplies.....				
5. Investments (Government obligations):				
(a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions.....	\$		\$	
(b) Obligations of the United States.....				
(c) Obligations of instrumentalities of the United States.....				
6. Other investments:				
(a) Stocks of domestic corporations.....	\$		\$	
(b) Bonds of domestic corporations.....				
(c) Stocks and bonds of foreign corporations.....				
(d) Treasury stock.....				
(e) All other investments or loans.....				
7. Deferred charges:				
(a) Prepaid insurance, taxes, etc.....		11,659 29		10,119 61
8. Capital assets:				
(a) Buildings.....	\$ 6,095,957 80		\$ 6,169,657 53	
(b) Machinery and equipment.....				
(c) Furniture and fixtures.....				
(d) Delivery equipment.....				
(e) Other depreciable assets.....				
(f) Total of lines (a) to (e).....	\$ 6,095,957 80		\$ 6,169,657 53	
(g) Less reserve for depreciation.....	1,590,670 71	4,505,287 09	1,728,053 28	4,441,604 25
(h) Depreciable assets.....	\$		\$	
(i) Less reserve for depletion.....				
(j) Land.....		5,245,399 47		5,245,399 47
9. Other assets (itemize below):				
Construction account.....	\$ 28,852 06		\$	
		28,852 06		
10. Total Assets.....		\$ 9,839,666 68		\$ 9,822,667 11
LIABILITIES AND CAPITAL				
11. Accounts payable.....		\$ 1,567 28		\$ 7,877 11
12. Bonds, notes, and mortgages payable (with original maturity of less than 1 year).....				
13. Bonds, notes, and mortgages payable (with original maturity of 1 year or more).....		8,618,000 00		7,598,000 00
14. Accrued expenses:				
(a) Interest.....	\$		\$	
(b) Taxes.....				
(c) All others.....				
15. Other liabilities (itemize below):				
Retained Earnings.....	\$ 5,205 00		\$ 1,950 00	
		5,205 00		1,950 00
16. Surplus reserves (itemize below):				
	\$		\$	
17. Capital stock:				
(a) Preferred stock.....	\$		\$	
(b) Common stock.....	No Par, No Stated Value		No Par, No Stated Value	
18. Paid-in or capital surplus.....		525,000 00		1,825,000 00
19. Earned surplus and undivided profits.....		689,894 40		689,839 99
20. Total Liabilities and Capital.....		\$ 9,839,666 68		\$ 9,822,667 11

Schedule O.—CHANGES IN CORPORATION'S OBLIGATIONS AND CAPITAL STOCK (See Instruction O)

	Obligations	Preferred Stock*	Common Stock
1. Total cash receipts during taxable year on SHAW-WALKER corporation's own interest-bearing obligations with original maturity of 1 year or more and capital stock.....	\$ 520,000 00	\$	\$
2. Total cash expenditures during taxable year for purchase or retirement of corporation's own interest-bearing obligations with original maturity of 1 year or more and capital stock.....	1,560,000 00		
3. Difference between lines 1 and 2.....	\$ 1,040,000 00	\$	\$

* Preferred stock for this purpose should be considered as stock which is preferred as to other dividends or assets, irrespective of formal designation.

Pacific Southwest Realty Company, Los Angeles
Year 1937

EXPLANATION OF TREATMENT OF SECURITIES DESIGNATED $5\frac{1}{2}\%$ CUMULATIVE PREFERRED SERIAL STOCK.

At the beginning of the taxable year there was outstanding \$1,000,000 par value of securities issued for \$953,142 during the year 1928. These securities were designated as $5\frac{1}{2}\%$ Cumulative Preferred Serial Stock and were treated as preferred stock in taxpayer's income tax returns for the year 1928 and subsequently. During this same period quarterly disbursements of $1\frac{3}{8}\%$ of the par value to holders thereof were treated as dividends.

As explained in taxpayer's letter of February 3, 1938 to the Commissioner of Internal Revenue, it is believed that these securities were, in fact, evidences of indebtedness of taxpayer, that holders thereof were creditors of taxpayer, and that the quarterly disbursements to said creditors were payments of interest on this indebtedness. Taxpayer's return for the taxable year ended December 31, 1937 has been made in conformity with this belief.

Said securities were called for redemption on July 1, 1937, at 102% of par value.

In this return the \$1,000,000 par value of securities, reported as Preferred Stock in the closing balance sheet for the taxable year ended December 31, 1936, is reflected in Item 13 of the balance sheet for the beginning of the year. The \$41,250 disbursed during the year to the holders of such securities as

dividends is included in Item 20, and the premium and unamortized discount in Item 26, of Schedule "A". [134]

Pacific Southwest Realty Company, Los Angeles
Year 1937

SCHEDULE NO. 1—OTHER INCOME

Item 13

Service Fees	\$44,627.83
Agency Fees	3,000.00
Commissions received on telephones.....	206.23
Commissions received on towels.....	97.48
Sale of baled waste paper.....	286.73
Miscellaneous	111.13
<hr/>	
Total.....	\$48,529.40

SCHEDULE NO. 2—OTHER DEDUCTIONS
AUTHORIZED BY LAW

Item 26

Refinancing expense	\$ 1,539.62
Lighting assessment	632.64
Insurance	13,177.78
Window washing, services, etc.....	7,550.83
Building equipment—miscellaneous replacements	328.07
Water, fuel, power and light.....	28,379.98
Engineers,' janitors', and watchmen's supplies	3,176.65
Directors' fees	125.00
Commission	2,381.03
Postage, stationery and supplies.....	828.07
Telephone and telegraph.....	684.29
Subscription and dues.....	553.11
Legal	2,386.45
Auto and travel	758.27
Miscellaneous	2,507.97
2% premium on debt retired.....	20,000.00
Unamortized discount on debt retired.....	31,275.39
<hr/>	
Total.....	\$116,285.15

SCHEDULE No. 3

Pacific Southwest Realty Company, Los Angeles

Year 1937

SCHEDULE K—EXPLANATION OF DEDUCTION FOR DEPRECIATION

Kind of Property	2. Date Acquired	3. Cost	5. Deprecia- tion allowed (or allowable) in prior years	6. Remaining Cost to be Recovered	7. Life used in accumu- lating Depreci- ation (Years)	8. Est. remain- ing life from be- ginning of year (Years)	9. Depre- ciation allowable this year
Buildings							
1. Alhambra—Brick.....	7- 1-23	\$ 32,727.28	\$ 11,678.07	\$ 21,049.21	13 1/2	27 1/2	\$ 765.42
2. Carpinteria—Brick.....	7- 1-23	15,446.92	5,109.74	10,337.18	13 1/2	34 1/2	299.62
3. El Centro—Brick.....	7- 1-23	20,209.45	7,285.16	12,924.29	13 1/2	26 1/2	487.71
4. Glendale—Brick.....	7- 1-23	11,251.10	4,084.49	7,166.61	13 1/2	26 1/2	270.43
5. Hanford—Brick.....	7- 1-23	45,650.00	25,222.33	20,427.67	13 1/2	13 1/2	1,513.16
8. Guadalupe—Brick.....	7- 1-23	9,602.31	3,108.40	6,493.91	13 1/2	34 1/2	188.22
10. Lemoore—Brick.....	7- 1-23	21,000.00	7,623.76	13,376.24	13 1/2	26 1/2	504.76
11. Lompoc—Brick.....	7- 1-23	29,151.56	10,528.15	18,623.41	13 1/2	26 1/2	702.77
12. Los Alamos—Brick.....	7- 1-23	6,020.83	2,185.75	3,835.08	13 1/2	26 1/2	144.72
13. Main & Commercial—Brick.....	7- 1-23	12,027.25	6,325.48	5,701.77	13 1/2	16 1/2	345.56
14. Sixth & Spring—Steel & Concrete.....	7- 1-23	678,516.36	234,027.27	444,489.09	13 1/2	25 1/2	17,430.94
15. Ocean Park—Brick.....	7- 1-23	40,510.76	14,706.87	25,803.89	13 1/2	26 1/2	973.73
16. Orentt—Concrete.....	7- 1-23	8,273.75	3,853.52	4,420.23	13 1/2	26 1/2	166.80
17. Oxnard—Brick.....	7- 1-23	78,361.02	21,157.47	57,203.55	13 1/2	36 1/2	1,567.22
18. San Luis Obispo—Brick.....	7- 1-23	22,655.24	8,960.90	13,694.34	13 1/2	19 1/2	702.27
19. San Luis Obispo—Brick.....	7-10-24	2,090.92	1,061.48	1,029.44	12 1/2	17 1/2	58.82
20. Marine—Brick.....	7- 1-23	48,183.00	17,340.97	30,842.03	13 1/2	26 1/2	1,163.85
21. Santa Maria—Brick*	7- 1-23	100,000.00	27,000.00	73,000.00	13 1/2	36 1/2	2,000.00
22. Tulare—Brick.....	7- 1-23	40,000.00	16,219.51	23,780.49	13 1/2	19 1/2	1,219.51
23. Venice—Brick.....	7- 1-23	25,571.50	9,142.59	16,428.91	13 1/2	26 1/2	619.96
24. Visalia—Brick.....	7- 1-23	59,349.50	28,377.77	30,971.73	13 1/2	16 1/2	1,877.07
25. Whittier—Brick.....	7- 1-23	26,460.55	8,829.52	17,631.03	13 1/2	33 1/2	526.30
26. Redlands—Brick.....	7- 1-23	4,281.90	2,252.01	2,029.89	13 1/2	16 1/2	123.02
27. Redlands—Steel & Concrete.....	7- 1-23	97,318.70	25,968.63	71,350.07	13 1/2	36 1/2	1,954.80
33. Lindsay—Brick.....	4-28-24	34,765.92	16,861.14	17,904.78	12 2/3	17 1/3	1,032.97
36. Exeter—Brick.....	4-28-24	6,000.00	2,050.69	3,949.31	12 2/3	27 1/3	144.49
38. Saticoy—Concrete.....	4-28-24	6,000.00	2,050.69	3,949.31	12 2/3	27 1/3	144.49
39. Fillmore—Concrete.....	4-28-24	20,900.99	5,350.32	15,550.67	12 2/3	27 1/3	568.93
40. Brawley—Brick.....	4-28-24	14,683.37	6,903.16	7,780.21	12 2/3	17 1/3	448.86
40. Brawley—Brick.....	4-28-24	10,110.67	4,752.04	5,358.63	12 2/3	17 1/3	309.15
40. Brawley Add.—Concrete.....	5- 1-36	5,200.69	69.32	5,131.37	2/3	49 1/3	104.00
41. Calipatria—Brick.....	4-28-24	22,994.00	9,799.33	13,194.67	12 2/3	27 1/3	482.73
21. Santa Maria—Brick*	7- 1-23	5,582.72	2,119.17	3,463.55	13 1/2	19 1/2	177.62

Kind of Property	2. Date Acquired	3. Cost	5. Depreciation allowed (or allowable) In prior years	6. Remaining Cost to be Recovered	7. Life used in accumulating Depreciation (Years)	8. Est. remaining life from beginning of year (Years)	9. Depreciation allowable this year
42. Westmorland—Concrete	4-28-24	\$ 18,000.00	\$ 5,625.42	\$ 12,374.58	12 2/3	34 1/3	\$ 360.42
43. Avalon & Vernon—Brick	6-24-25	32,000.00	8,576.40	23,423.60	11 1/2	38 1/2	608.40
44. Santa Paula—Concrete & Brick	6-24-25	60,000.00	17,470.03	42,529.97	11 1/2	35 1/2	1,198.03
45. Fullerton—Brick	6-24-25	69,077.60	21,886.65	47,190.95	11 1/2	28 1/2	1,655.82
45. Fullerton—Concrete & Hollow Tile	9-15-30	9,611.66	1,568.14	8,043.52	6 1/2	33 1/2	240.11
47. Jefferson & University—Brick	1925	54,750.00	15,815.83	38,934.17	12	38	1,024.58
48. Desmond's—Brick & Concrete	1925	430,014.18	122,785.80	307,228.38	12	38	8,084.96
49. Porterville—Brick	9-28-27	45,408.85	11,225.59	34,183.26	9 1/4	30 3/4	1,111.65
A. Seventh & Witmer—Brick	6-24-25	25,000.00	9,986.78	15,013.22	12	28	536.19
B. Pasadena—Concrete	1- 1-25	1,303,830.00	312,000.00	991,830.00	12	38	26,051.06
Dohrmann—Concrete	7- 1-27	70,652.75	17,475.84	53,176.91	9 1/2	30 1/2	1,743.50
C. Pasadena—Concrete	7- 1-28	270,488.56	48,616.15	221,872.41	9	41	5,411.52
D. Highland & Hollywood—Steel & Con.	7- 1-28	514,024.31	87 377.78	426,646.53	8 1/2	41 1/2	10,280.64
F. Fresno—Concrete & Brick	1- 1-25	1,112,858.50	267,085.99	845,772.51	12	38	22,257.17
Fresno—Air Conditioning System	9- 1-36	70,835.02	1,558.61	69,276.41	1/3	14 2/3	4,223.39
G. Sixth & Alvarado—Brick	7- 3-28	33,458.32	8,014.66	25,443.66	8 1/2	31 1/2	807.73
H. Carthay Center—Brick	7- 3-28	26,081.45	4,769.99	21,311.46	8 1/2	41 1/2	513.53
I. Jefferson & Arlington—Concrete	7- 3-28	19,840.42	3,628.61	16,211.81	8 1/2	41 1/2	390.64
J. La Brea—Brick	7- 3-28	66,355.21	11,926.09	54,429.12	8 1/2	41 1/2	1,311.54
K. Belvedere Gardens—Brick	7- 3-28	14,014.55	1,851.73	12,162.82	8 1/2	41 1/2	246.78
L. Moneta—Brick	7- 3-28	12,225.35	2,672.54	9,552.81	8 1/2	31 1/2	303.26
M. Culver City—Brick	7- 3-28	15,576.00	3,761.72	11,814.28	8 1/2	31 1/2	375.06
P. San Fernando—Brick	7- 3-28	86,110.80	18,634.78	67,476.02	8 1/2	31 1/2	2,142.10
Q. Altadena—Brick	7- 3-28	40,882.45	8,869.40	32,013.05	8 1/2	31 1/2	1,016.28
R. Santa Barbara—Brick	7- 3-28	94,133.76	20,578.23	73,555.53	8 1/2	31 1/2	2,335.10
S. Dinuba—Brick	7- 3-28	18,542.60	4,053.55	14,489.05	8 1/2	31 1/2	459.97
Eighth & Olive—Brick	12- 1-35	39,957.51	848.70	39,108.81	1	34	925.79
Santa Monica Bldg.—Brick & Concrete	1- 1-37	30,453.64	0.00	30,453.64	0	50	609.07
Santa Monica—Fixtures	1- 1-37	24,575.78	0.00	24,575.78	0	15	1,638.38
		\$6,169,657.53	\$1,590,670.71	\$4,578,986.82			\$137,382.57

SCHEDULE NO. 4

Pacific Southwest Realty Company, Los Angeles

Year—1937

SCHEDULE OF 50% OR MORE OWNED CORPORATION

	<u>Percentage of Stock Owned</u>	<u>Acquired</u>	<u>Return Filed</u>
Pacific Southwest Realty Company (of California), Los Angeles, California	100.	1923	California Sixth

SCHEDULE OF 50% OR MORE VOTING STOCK
OWNED BY ANOTHER

	<u>Percentage of Stock Owned</u>	<u>Acquired</u>	<u>Return Filed</u>
Security-First National Bank of Los Angeles, Los Angeles, California	100.	1933	California Sixth [138]

SCHEDULE NO. 5

Pacific Southwest Realty Company, Los Angeles

Year—1937

DIVIDEND CARRY-OVER FROM PRECEDING
TAXABLE YEAR

Schedule M—Line 12

Cash Distributions During the Calendar Year 1936.....	\$702,325.63
Adjusted Net Income as Shown by Form 1120 for the Calendar Year 1936.....	479,489.44
Dividend Carry-Over for 1937.....	\$222,836.19
	[139]

DIVIDEND ON COMMON STOCK

Resolved, that a cash dividend of \$7.00 a share on the 50,000 shares of common stock of this Company, amounting to \$350,000.00, be and the same is hereby declared out of the earned surplus of this Company payable December 30, 1937, to stockholders of record December 29, 1937.

I, G. C. Cook, Secretary of the Pacific Southwest Realty Company, hereby certify that the above and foregoing is a full, true and correct copy of a Resolution unanimously adopted by the Board of Directors of said Company at a meeting duly and regularly called and held December 22, 1937, at which meeting a quorum was present and voted; and that said Resolution has not been repealed or amended and that the same is still in full force and effect.

(Seal)

G. C. COOK,
Secretary.

Dated: Feb. 15, 1938. [140]

POWER OF ATTORNEY

Know All Men by These Presents:

That we, the undersigned, on behalf of the Pacific Southwest Realty Co. a corporation, having its principal place of business in the city of Los Angeles, State of California, have made, constituted and appointed, and do hereby make, constitute and appoint, Claude I. Parker and/or Thos. R. Benner, of Los Angeles, the true and lawful attorney or

agent for the corporation and in its name and on its behalf to act in all matters pertaining to any Federal Taxes now assessed, proposed to be assessed, or which may hereafter be assessed against said corporation, or the consideration and determination of which may be pending or may hereafter be pending in the Treasury Department at Washington, D. C., or in any Division, Bureau or Section thereof, whether in or out of the said City of Washington; giving and granting unto said attorney or agent full power and authority to do and perform all and every act or thing whatsoever requisite and necessary to be done in and about the premises as fully, to all intents and purposes, as any of the officers of the corporation might do if personally present, with full power of substitution or revocation, hereby ratifying and confirming all that said attorney or agent, or his substitute or substitutes shall lawfully do or cause to be done by virtue of these presents, hereby specifically revoking all prior powers of attorney.

In Witness Whereof, we have hereunto set our hand and seal this 28th day of January, 1931.

PACIFIC SOUTHWEST
REALTY CO.,

By (Signed) W. B. STRINGFELLOW,
Vice-President.

(Corporate Seal)

(Seal)

Attest: (Signed) WM. DOWNEY,

Secretary of the Pacific South-
west Realty Co.

1937 RETURN

CAPITAL-STOCK TAX

For Year Ending June 30, 1937

DOMESTIC CORPORATIONS

(Sec. 166, Revenue Act of 1936, as amended by Sec. 481 of the Revenue Act of 1939)

This return must be filed, in triplicate, and received by the Collector of Internal Revenue for your district on or before July 31, 1937. The tax must be paid on or before that date.

DUPLICATE—Page 2

612-1098

AMOUNT PAID IN ADVANCE

AUG

(Month)

4338

Form 707
TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
REVISED 1937

San Francisco, California

1937

NOTARIES OFFICE

U. S.

To be forwarded by collector, showing district and date received

- Name Pacific Southwest Realty Company
- Address 215 West Sixth Street, Los Angeles, California
- Name of parent company, if any Security-First National Bank of Los Angeles
- Name of subsidiary, if any Pacific Southwest Realty Co., California
- Nature of business in detail Owns and operates improved real estate
- Incorporated or organized in State of Delaware Month May
- Was a capital-stock tax return filed for the preceding taxable year ended June 30, 1936? Yes
- Date of close of last income-tax taxable year ended on or prior to June 30, 1937, or, if newly organized, date of organization December 31, 1936

Corporations making an original declaration of value upon this return must enter the amount of such declared value. This must not be used by a corporation which established its original declared value by the first return for the year ended June 30, 1936.

9. ORIGINAL DECLARED VALUE OF ENTIRE CAPITAL STOCK

(The value declared must be definite and unqualified. A value must be declared in every case regardless of whether exemption from the tax is claimed.)

Corporations which have established their original declared value by the return for the year ended June 30, 1936, must enter the value as provided for in Schedule I on page 3 of this return and then enter the amount of the adjustment.

10. ADJUSTED DECLARED VALUE OF ENTIRE CAPITAL STOCK (Last Item of Schedule I, page 3)

EXEMPTIONS.—The Act provides for an exemption from the tax only on the grounds indicated below. Corporation claiming exemption must (1) report a value for the capital stock under item 9 or 10, (2) check the appropriate block in the column below, and (3) submit with the return a full statement of the evidence specified under the block checked.

- ☐ Corporation exempt from income tax under section 101, Revenue Act of 1936. (1) State under which exemption is claimed.
- ☐ Insurance company subject to tax under section 201, 204, or 207, Revenue Act of 1936. State which exempts.
- ☐ Corporation not doing business. (1) Furnish information required by instruction 16. (2) Report value of capital stock in item 9 or 10 above.

COMPUTATION OF TAX	FOR USE OF TAXPAYER	FOR USE OF INSURANT
12. Amount reported in item 9 or 10.....	\$ 6 180 120 52	
13. Tax at rate of \$1 for each full \$1,000 in item 12 (omit cents).....	6 180	XXXX
14. Penalty of percent for delinquency in filing return.....		
15. Interest at 6% per annum beginning August 1, 1937.....		
16. Total tax, penalty, and interest.....	6 180	

We, the undersigned W. B. Stringfeller Vice President

(Name of president, or any officer or other principal officer)

J. E. Smith Treasurer

(Name of treasurer, assistant treasurer, or chief accounting officer)

I, the undersigned, being severally duly sworn, each for himself deposes and says that this return, including any accompanying schedules and statements, has been examined by him and is, to the best of his knowledge and belief, a true and complete return, made in good faith, for the taxable year stated, pursuant to the Revenue Act of 1936, as amended, and the regulations issued thereunder.

Sworn to and subscribed before me this 29 day of July 1937

W. B. Stringfeller Vice President

J. E. Smith Treasurer

NOTARIAL SEAL

NOTARY PUBLIC

CORPORATE SEAL

The schedules on this page must be filled in by every corporation making adjustments to an original declared value for the capital stock established by the return for the year ended June 30, 1934. See Instructions 5 to 9, inclusive.

SCHEDULE I. ADJUSTMENT OF ORIGINAL DECLARED VALUE OF ENTIRE CAPITAL STOCK FOR ALL TRANSACTIONS DURING THE INCOME-TAX TAXABLE YEAR ENDED December 31, 1936

Original declared value as established by the first return for the taxable year ended June 30, 1934. \$9,500,000.00

Additions:

(1) Total cash paid in for stock or shares (see instruction 7, item 1).....	\$.....
(b) Fair market value of all property received for stock or shares (see instruction 7, item 1).....	525,000.00
(2) Paid-in surplus and contributions to capital (see instruction 7, item 2).....	562,740.52
(3) Net income (see instruction 7, item 3).....	
(4) Excess of income wholly exempt from tax over amount disallowed as deductions by section 24 (a) (5) of the Revenue Act of 1934 or 1936 (see instruction 7, item 4).....	
(5) Dividend deduction allowable for income-tax purposes (see instruction 7, item 5).....	
Total additions	1,087,740.52

TOTAL BEFORE DEDUCTIONS

10,587,740.52

Deductions:

(A) (1) Total cash distributed in liquidation to shareholders (see instruction 7, item A).....	3,948,525.00
(2) Fair market value of all property distributed in liquidation to shareholders (see instruction 7, item A).....	
(B) Distributions of earnings or profits (see instruction 7, item B).....	459,095.00
(C) Excess of deductions allowable over gross income and claimed on income-tax return (see instruction 7, item C).....	
Total deductions	4,407,620.00

ADJUSTED DECLARED VALUE (enter in item 10, page 1).....

6,180,120.52

SCHEDULE II. ANALYSIS OF CHANGES IN CAPITAL STOCK AND SURPLUS

Capital Stock and Surplus at beginning of year

1. Capital stock: Preferred.....	\$4,766,500.00
Common.....	No Par Value
2. Capital or paid-in surplus.....	
3. Surplus reserves.....	
4. Surplus and undivided profits.....	733,191.67

Additions—Capital transactions

5. Total cash and fair market value of property paid in for stock or shares (total of items 1(a) and 1(b), Schedule I)*.....	
6. Paid-in surplus and contributions to capital (item 2, Schedule I)*.....	525,000.00
7. Other additions (to be detailed).....	

Deductions—Revenue transactions

8. Net income (item 3, Schedule I).....	562,740.52
9. Income wholly exempt from income tax (This total less the amount entered as item 17 of this schedule should correspond with item 4, Schedule I) (see instruction 7, item 4).....	
10. The amount of the dividend deduction allowable for income-tax purposes (item 5, Schedule I) (see instruction 7, item 5).....	
11. Other deductions (to be detailed).....	
Schedule Attached	157,952.16

TOTAL..... **\$6,745,388.35**

Deductions—Capital transactions

12. Liquidating distributions (total of items A(1) and A(2), Schedule I)*.....	3,948,525.00
13. Other distributions (item B, Schedule I)*.....	459,095.00
14. Enter class and amount of distributions in corporation's own stock:.....	
.....	\$.....
15. Other deductions (to be detailed).....	

Deductions—Revenue transactions

16. Excess of deductions allowable over gross income and claimed on income-tax return (item C, Schedule I).....	
17. Deductions disallowed by sec. 24 (a) (5), 1934 or 1936 Act. (See item 9 of this schedule).....	
18. Other deductions (to be detailed).....	
U.S. income tax paid.....	58,607.48
Disallowed capital loss.....	3,056.88
Difference between dividends payable at beginning and end of year included as Reserves in Balance Sheet.....	61,205.63
Capital Stock and Surplus at end of year.....	
19. Capital stock: Preferred.....	1,000,000.00
Common.....	No Par Value
20. Capital or paid-in surplus.....	525,000.00
21. Surplus reserves.....	123,750.00
22. Surplus and undivided profits.....	566,144.40
TOTAL	\$6,745,388.35

*Enter values shown by the books if different from values entered in Schedule I and explain difference.

MR. JOHN EARL JARDINE

was called as a witness by petitioner and being first duly sworn testified on direct examination as follows:

Direct Examination

My name is John Earl Jardine. I am president of William R. Staats Co., investment bankers and brokers. I have been connected with the firm for 37 years and have been president since 1920. Since 1905 my services with the company have been rendered in the City of Los Angeles. In the course of my employment my firm has been required to buy and sell stocks and bonds over the counter and on the exchange and I am personally familiar with the manner in which stocks and bonds are traded. My company handled transactions in the 6½% Cumulative Preferred Serial Stock and 5½% Cumulative Preferred Serial Stock of the Pacific Southwest Realty Company and I am personally familiar with the manner in which those transactions were handled. The securities mentioned were not listed on an exchange but were traded in what is commonly known as over-the-counter; that is, by personal solicitation with the holders of the securities or those that contemplate buying them. In these transactions accrued but unpaid dividends were customarily added to the price of the stock. They were added before the dividend declaration, if any, was made, similar to the interest on bonds. It is not the custom in trading in preferred stocks to take into consideration accrued dividends of this type. It is the

(Testimony of John Earl Jardine.)

custom in buying and selling bonds to take into consideration accrued interest. Generally speaking, I would say that so far as our firm is concerned, the general practice in dealing with these securities of the Pacific Southwest Realty Company [57] was to trade in them with accrued dividends. There were occasions when they were handled flat but customarily they were traded in with accrued dividends. The occasions in which our firm traded in said securities flat were almost entirely on the buy side. There were occasions when the stock was purchased flat but as far as I was able to have our records checked, when the securities were sold they were sold plus accrued dividends. I would say that if they were purchased flat on any occasion, the price paid for the security took into consideration the amount of the accrued dividend at that time accrued.

Cross Examination

On cross examination Mr. Jardine testified as follows:

Q. (By Mr. Tonjes): Is it true that when buying a stock which has an excellent record for the payment of dividends over a long period of time that the fact that there is a dividend about due to be declared, based on its previous record of declarations, that that stock is somewhat advanced in price on account of that expected dividend?

A. That would be true in a very orderly market. Of course, if you were getting a breaking mar-

(Testimony of John Earl Jardine.)

ket, why, that would not necessarily be taken into consideration; but in an orderly market, yes, that would be correct.

Q. Well, in a breaking market, most of the rules are discarded in any event, are they?

A. That is true.

Thereupon,

MR. VERNE B. WOOD

was called as a witness by petitioner and having been duly sworn testified as follows:

Direct Examination

My name is Verne B. Wood. I am employed by the Security-First [58] National Bank of Los Angeles as Auditor. That Audit Department of the bank audits the books and records of the Pacific Southwest Realty Company and I render services in connection with the income tax returns of the Pacific Southwest Realty Company. I prepared or supervised the preparation of the income tax returns of the Pacific Southwest Realty Company for the years 1936 and 1937. I am familiar with the securities of the Pacific Southwest Realty Company designated 6½% Cumulative Preferred Serial Stock and 5½% Cumulative Preferred Serial Stock. In 1936 and 1937 I knew these securities by name but I wasn't familiar with the terms.

(Testimony of Verne B. Wood.)

Q. (By Mr. Kohlmeier) It is stipulated, and the income tax returns introduced as exhibits show, that no deductions were taken in the income tax return filed for the company for 1936 for the payments made on these particular securities or for any portion of the discount at which they were issued or for the premium at which they were retired. Will you explain why these deductions were not taken in that return?

A. The securities are called stocks. The payments that were made to the holders were called dividends, and they were so treated in the return without having given any thought as to whether they might be something else.

Q. Did you ever receive any advice or instructions from the officers of the corporation as to the manner in which these payments should be treated for income tax purposes?

A. I don't recall of ever having discussed the subject.

Q. Did you ever confer with tax counsel in that regard? A. Later, yes.

Q. It is stipulated, and the return for the year 1937 which [59] has been introduced as an exhibit discloses, that the payments and the other expenses connected with these securities were deducted in the 1937 return. Will you explain why your practice in regard to these payments was changed in the year 1937?

(Testimony of Verne B. Wood.)

A. I think it was shortly after the 1937 returns were filed that I read an opinion of the Circuit Court of Appeals in connection with the Jewel Tea Company, and in that case the question to be decided was whether dividends, or a premium, rather, on a security that was called stock, at least, was deductible in the preparation of income tax returns. And the remarks of the Court were to the effect that the name of a security was not determinative of its character, and a security called a stock might be a bond or a bond might be a stock in reality, and I looked up other court cases. I knew that the certificates of the Pacific Southwest Realty Company provided for retirement serially, so I made it a point to study the certificates and find out their terms, and I found out that there was a provision for retirement at specified dates, and there was also provision in there for the holders of the security to enforce payment; and it was after that that I consulted counsel when it was determined that the securities represented an obligation of the company, and in 1937 all of the outstanding securities were retired and I believe there is a premium, and we decided that in the '37 return that the payments should be treated as interest and should be deducted. And that was likewise true of the discount and expense that we had failed to amortize over the life of the security.

MR. ROBERT H. PARSONS

was called as a witness by petitioner and having been duly sworn testified on direct examination as follows:

Direct Examination

My name is Robert H. Parsons. I am president of the Pacific [60] Company of California, which company is engaged in the business of investment dealers—dealers and brokers. I have been employed with that company since 1934 and prior to that time I was employed by the Security First Company, which company was also a dealer and broker in securities. The First Securities Company was the predecessor of Security First Company and I was vice-president of that company. In connection with my employment I have become personally familiar with the manner in which stocks and bonds are traded on the stock exchange or over the counter. Our company handled transactions in the 6½% Cumulative Preferred Serial Stock and 5½% Cumulative Preferred Serial Stock of the Pacific Southwest Realty Company. The First Securities Company was the principal underwriter of said securities. I am personally familiar with the manner in which the transactions in those securities were handled by my company. With respect to accrued but undeclared dividends, we almost entirely bought and sold them with accrued dividends added. It was not the custom in trading in preferred stocks to trade them with accrued dividends added. It was the custom in

(Testimony of Robert H. Parsons.)

dealing in bonds to trade in them with the accrued interest, if the bonds were not in default. That practice was not followed to my knowledge in trading in any other preferred stock.

Cross Examination.

On cross examination Mr. Parsons testified as follows:

I was vice-president of the First Securities Company until the merger of the First National Bank of Los Angeles with the Security Trust and Savings Bank. I believe it was from about 1923 or 1924 but I haven't the exact date. I think I was vice-president of the company at the time the Pacific Southwest Realty Company first issued its preferred [61] stock. I do not recall my election to the vice-presidency but I was in a similar capacity as manager of the sales organization at the time the Pacific Southwest Realty Company issued its preferred stock, but I am not quite sure whether I was vice-president or an officer. At the time the securities in question were issued the First Securities Company owned all of the stock of the Pacific Southwest Realty Company, petitioner herein.

There being no further evidence the matter was submitted to the Board.

The foregoing evidence including the Stipulation of Facts and exhibits attached thereto is all the evidence adduced at the hearing before the Board of Tax Appeals material to the issues presented on appeal, and the same is approved by the undersigned as attorneys for the petitioner on review.

CLAUDE I. PARKER

JOHN B. MILLIKEN

BAYLEY KOHLMEIER

Attorneys for Petitioner.

Of Counsel:

L. A. LUCE

937 Munsey Building,

Washington, D. C.

The foregoing evidence including the Stipulation of Facts and exhibits attached thereto is all the evidence adduced at the hearing before the Board of Tax Appeals material to the issues presented on appeal, and the same is approved by the undersigned as attorneys for the respondent.

J. P. WENCHEL

W

Attorneys for Respondent.

[Endorsed]: U. S. B. T. A. Filed Jan. 21, 1942.

[62]

[Title of Board and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto, through their respective counsel of record, that the following facts are true and may be found as facts by the United States Board of Tax Appeals.

1. Petitioner corporation was duly organized under the laws of the State of Delaware on May 31, 1923 and thereafter, in June 1923, qualified to do business in the State of California and established its principal place of business in Los Angeles, California. Petitioner filed its income tax returns for the years 1936 and 1937 with the Collector of Internal Revenue for the Sixth District of California at Los Angeles, California.

2. Petitioner was incorporated by persons affiliated with the Pacific Southwest Trust and Savings Bank and the First National Bank of Los Angeles for the purpose of acquiring and thereafter owning and operating all the real estate properties owned by the Pacific Southwest Trust and Savings Bank and one parcel of real estate owned by the First National Bank of Los Angeles, and for the further purpose [63] of providing additional bank premises as the growth of the banks required. The reasons for the organization of petitioner were those stated in the letter attached hereto as Exhibit "D".

3. A true and correct copy of Article Fourth of

the Certificate of Incorporation of petitioner is attached hereto, marked Exhibit "A", and by this reference made a part hereof.

4. All of the common stock of petitioner, except directors' qualifying shares, was issued during the year 1923 to the First Securities Company, a corporation. A true copy of the certificates issued to evidence said common stock of petitioner is attached hereto, marked Exhibit "B", and by this reference made a part hereof. All of the stock of said First Securities Company and all of the stock of the Pacific Southwest Trust and Savings Bank and the First National Bank of Los Angeles was owned by the Los Angeles Trust & Safe Deposit Company, a corporation, as trustee, in trust for the benefit of the owners of beneficial certificates which were issued by said Los Angeles Trust & Safe Deposit Company. All of the stock of the Los Angeles Trust & Safe Deposit Company was owned by First Securities Company.

5. During the years 1923, 1924 and 1925 petitioner issued and sold its securities designated 6½% Cumulative Preferred Serial Stock of the total par value of \$4,500,000 in accordance with and pursuant to the authority granted it by Article Fourth of its Certificate of Incorporation. A true copy of the certificates issued to evidence said 6½% Cumulative Preferred Serial Stock is attached hereto, marked Exhibit "C", and by this reference made a part hereof. Said securities were issued in twenty-three series designated A to W inclusive,

Series A of said securities was to mature and become payable on July 1, 1929 and the remaining series [64] were to mature and become payable successively on July first of each year thereafter to and including the year 1951. At all times herein mentioned after the issuance of said 6½% Cumulative Preferred Serial Stock petitioner regularly made payments to the holders thereof at the rate of 6½% of the par value per annum at the times and in the manner provided in said certificates.

6. A true and correct copy of the letter which was sent on or about June 8, 1923 by Pacific Southwest Trust and Savings Bank to the owners of the beneficial interest in the stock of Pacific Southwest Trust and Savings Bank, First National Bank of Los Angeles and First Securities Company, in which the said beneficial owners were offered the right to subscribe to the 6½% Cumulative Preferred Serial Stock to be issued by petitioner, is attached hereto, marked Exhibit "D", and by this reference made a part hereof. A true and correct copy of the prospectus which was published in connection with the issuance and sale of petitioner's 6½% Cumulative Preferred Serial Stock in 1923 is attached hereto, marked Exhibit "E", and by this reference made a part hereof.

7. Series A of said 6½% Cumulative Preferred Serial Stock matured and was redeemed on July 1, 1929 and Series B, C, D, E, F and G of said securities matured and were redeemed respectively on July first of each year thereafter to and including 1935.

At the beginning of the year 1936 securities of petitioner designated 6½% Cumulative Preferred Serial Stock were issued, outstanding and unma-tured of a total par value of \$3,766,500.00. During the year 1936 all of said securities were redeemed and retired. During the year 1936 petitioner made payments to the holders of said 6½% Cumulative [65] Preferred Serial Stock at the rate of 6½% per annum of the par value thereof, or, to wit, \$65,-300.63, as provided in the certificates.

8. Under date of July 1, 1923 petitioner leased certain of its properties to Pacific Southwest Trust and Savings Bank for a term of thirty years commencing on July 1, 1923 and ending on June 30, 1953. A true and correct copy of portions of said lease is attached hereto, marked Exhibit "F", and by this reference made a part hereof.

9. On December 16, 1927 Article Fourth of the Certificate of Incorporation of petitioner was amended. A true and correct copy of Article Fourth of the Certificate of Incorporation of petitioner as amended on December 16, 1927 is attached hereto, marked Exhibit "G", and by this reference made a part hereof.

10. During the year 1928 pursuant to the author-ity granted it by Article Fourth of its Certificate of Incorporation, as amended on December 16, 1927, petitioner issued and sold its securities designated 5½% Cumulative Preferred Serial Stock of the total par value of \$1,000,000. A true copy of the certificates issued to evidence said 5½% Cumula-tive Preferred Serial Stock is attached hereto,

marked Exhibit "H", and by this reference made a part hereof. A true and correct copy of the prospectus which was published in connection with the issuance and sale of petitioner's 5½% Cumulative Preferred Serial Stock in 1928 is attached hereto, marked Exhibit "I", and by this reference made a part hereof. Said securities designated 5½% Cumulative Preferred Serial Stock were issued in twenty-two series designated AA to VV inclusive. Series AA was to mature and become payable on July 1, 1939 and the remaining series [66] were to mature and become payable successively on July first of each year thereafter to and including the year 1960.

11. During the year 1936 there were issued and outstanding securities of petitioner designated 5½% Cumulative Preferred Serial Stock of the par value of \$1,000,000. All of said securities were redeemed and retired during the year 1937. During the years 1936 and 1937 petitioner made payments to the holders of said securities, as provided in the certificates, at the rate of 5½% of the par value thereof, or, to wit, \$55,000.00 during the year 1936 and \$41,250.00 during the year 1937.

12. Petitioner's securities designated 5½% Cumulative Preferred Serial Stock issued and sold as aforesaid were sold at discounts of \$3.00 and \$5.00 per \$100 par value. The total discount at which said securities were sold was \$46,858.00. If the discount at which said securities were sold was a deductible expense it was an expense which it was proper to amortize and deduct over the life of said securities

and \$1,833.26 of said discount expense was properly allocable to the year 1936 and \$31,275.39 of said discount expense was properly allocable to the year 1937.

13. During the year 1936 petitioner redeemed and retired all of its then outstanding securities designated 6½% Cumulative Preferred Serial Stock for the face value thereof plus a total premium of \$182,025.00.

14. During the year 1937 petitioner redeemed and retired all of its then outstanding securities designated 5½% Cumulative Preferred Serial Stock for the face value thereof plus a total premium of \$20,000.00. [67]

15. During the year 1929 petitioner sold certain real property located in the City of Los Angeles, State of California, under a conditional sales contract. Under the provisions of said contract petitioner retained title to said property until the purchase price was paid. On November 15, 1935, by reason of the default of the purchaser of said property, petitioner cancelled the sales contract and repossessed said property. At the time said property was repossessed by petitioner there were assessed but unpaid property taxes against said property in the amount of \$5,618.35. Said taxes were payable one-half on or before December 5, 1935 and one-half on or before April 20, 1936. During the year 1936 petitioner paid said property taxes in full. Petitioner deducted said sum of \$5,618.35, under the provisions of Section 23(c) of the Revenue Act of

1936, in computing its net taxable income for the year 1936.

16. In its income tax return for the year 1936 petitioner failed to take deductions for the payments made on its securities designated 6½% Cumulative Preferred Serial Stock and 5½% Cumulative Preferred Serial Stock, failed to take deduction for the portion of the discounts at which its securities designated 5½% Cumulative Preferred Serial Stock were issued and sold which was allocable to the year 1936, and failed to take a deduction for the premium paid upon the redemption of its securities designated 6½% Cumulative Preferred Serial Stock. In its income tax return for the year 1936 petitioner reported net taxable income in the amount of \$562,740.52 and a tax liability in the amount of \$83,251.08. Petitioner paid said tax in installments as follows: \$20,812.77 on [68] March 15, 1937 and like amounts on June 12th, September 13th, and December 13, 1937. Petitioner's return for the year 1936 was filed on March 15, 1937.

17. Upon examination of petitioner's income tax return for the year 1936 the Commissioner disallowed the deduction taken by petitioner for real estate taxes in the amount of \$5,618.35 and determined the net income of petitioner for the year 1936 to be \$568,358.87. The deficiency proposed to be assessed for the year 1936 in the amount of \$842.75 resulted from the disallowance of said deduction and the consequent increase in petitioner's net income. In redetermining petitioner's net in-

come for the year 1936 the Commissioner did not allow any deductions for the payments made by petitioner during said year on its securities designated 61½% Cumulative Preferred Serial Stock and 51½% Cumulative Preferred Serial Stock, did not allow a deduction for any portion of the discount at which petitioner's securities designated 51½% Cumulative Preferred Serial Stock were issued and did not allow a deduction for the premiums paid by petitioner upon the redemption of its securities designated 61½% Cumulative Preferred Serial Stock.

18. On March 6, 1940 petitioner filed with the Collector of Internal Revenue for the Sixth District of California, at Los Angeles, California, its written claim for refund of income taxes overpaid by it for the year 1936 in the amount of \$53,900.53, setting forth therein the same facts and grounds herein alleged and relied upon. A true copy of said claim for refund is attached to the Petition herein, marked Exhibit "B", and is by this reference made a part hereof.

19. In its income tax return for the year 1937 petitioner [69] deducted as interest paid the payments made on its securities designated 51½% Cumulative Preferred Serial Stock in the amount of \$41,250.00, deducted the sum of \$31,275.39 as the portion of the discount at which said securities designated 51½% Cumulative Preferred Serial Stock were issued and sold which was properly allocable to the year 1937 and deducted the premium paid in the amount of \$20,000.00 upon the redemption of said securities designated 51½% Cumulative Pre-

ferred Serial Stock. The Commissioner refused to allow said deductions and as a result thereof has proposed the deficiency for the year 1937 herein contested.

20. On May 22, 1940 petitioner paid to the Collector of Internal Revenue for the Sixth District of California the deficiencies in income taxes proposed to be assessed against petitioner for the years 1936 and 1937 herein contested. Said payments were as follows: \$842.75 tax and \$161.09 interest, or a total payment of \$1,003.84 for the year 1936 and \$13,878.81 tax and \$1,820.21 interest, or a total payment of \$15,699.02 for the year 1937.

21. During the years 1923 and 1924 petitioner issued and sold its bonds of a total face value of \$3,000,000.00. A true and correct copy of the form of said bond certificates [70] is attached hereto, marked Exhibit "J", and by this reference made a part hereof.

22. Petitioner kept its books of account and made its income tax returns on the cash receipts and disbursements basis.

23. Petitioner used the proceeds received by it from the sale of its securities designated Cumulative Preferred Serial Stock and the sale of its First Mortgage Bonds for the purchase of real estate from the Pacific Southwest Trust and Savings Bank, the First National Bank of Los Angeles and other real estate suitable for the purposes of the corporation.

24. The payments made by petitioner to the holders of its securities designated 6½% Cumula-

tive Preferred Serial Stock and 5½% Cumulative Preferred Serial Stock were authorized by resolutions of the Board of Directors of petitioner. A true copy of one of the resolutions is attached hereto, marked Exhibit "K", and by this reference made a part hereof.

(s) CLAUDE I. PARKER

(s) JOHN B. MILLIKEN

(s) BAYLEY KOHLMEIER

808 Bank of America Building,
Los Angeles, California,
Counsel for Petitioner.

(s) J. P. WENCHEL

For the Bureau of Internal Revenue
Counsel for Respondent

Of Counsel:

(s) L. A. LUCE

937 Munsey Building
Washington, D. C.

Dated: [71]

EXHIBIT "A"

Article Fourth of the Certificate of Incorporation
of Petitioner Provided as Follows:

"Fourth: The total authorized capital stock of this corporation is One Hundred Thousand (100,000) shares, divided into Fifty Thousand (50,000) shares of preferred stock of the par value of One Hundred Dollars (\$100.00) each, amounting in the ag-

gregate to Five Million Dollars (\$5,000,000.00), and Fifty Thousand (50,000) shares of common stock, which shares shall have no nominal or par value. Said preferred stock shall be designated '6½% Cumulative Preferred Serial Stock'.

"Said 6½% Cumulative Preferred Serial Stock shall be issued by the corporation in twenty-three (23) series, to be designated by letters A to W, both inclusive, and each series shall be for the respective number of shares, and redeemable at their par value plus all unpaid, accrued, or accumulated dividends thereon, on the respective dates as follows:

Series	No. of Shares	Redeemable On
A.....	1,100	July 1, 1929
B.....	1,100	July 1, 1930
C.....	1,100	July 1, 1931
D.....	1,100	July 1, 1932
E.....	1,250	July 1, 1933
F.....	1,250	July 1, 1934
G.....	1,250	July 1, 1935
H.....	1,400	July 1, 1936
I.....	1,400	July 1, 1937
J.....	1,700	July 1, 1938
K.....	1,700	July 1, 1939
L.....	1,700	July 1, 1940
M.....	2,000	July 1, 1941
N.....	2,300	July 1, 1942
O.....	2,300	July 1, 1943
P.....	2,600	July 1, 1944
Q.....	2,900	July 1, 1945
R.....	3,050	July 1, 1946
S.....	3,350	July 1, 1947
T.....	3,650	July 1, 1948
U.....	3,950	July 1, 1949
V.....	4,450	July 1, 1950
W.....	3,400	July 1, 1951

“Said 6½% Cumulative Preferred Serial Stock may be issued as and when the Board of Directors of the corporation shall determine, but no preferred stock shall be issued except for the purpose of acquiring with the proceeds of the sale thereof property suitable for one or more of the purposes of the corporation. Said 6½% Cumulative Preferred Serial Stock shall be issued for cash at not less than ninety-six per cent (96% of the par value of said stock. The amount of preferred stock to be issued for such purpose shall not exceed, however, One [72] Hundred per cent (100%) of the appraised value of the property purchased, or to be purchased, with such proceeds. The aggregate indebtedness of the corporation secured by mortgage, deed of trust, or otherwise, shall not exceed in amount Fifty per cent (50%) of the appraised value of the property subject thereto. The total amount of preferred stock of the corporation at any time outstanding shall not, together with the total bonded indebtedness of the corporation, exceed One Hundred per cent (100%) of the appraised value of the property of the corporation. Said appraisements shall be made as of the date the corporation acquires said property. The appraisal of such property by an appraiser selected by the Superintendent of Banks of California, or by the Commissioner of Corporations of California, or by any official which shall be the successor of either of said officials, or if there is no such official qualified to make the selection of such appraiser, or if

such officials shall fail to select such appraiser, by an appraiser selected by the Trustee in any trust indenture executed by the corporation to secure any of its bonded indebtedness, shall be sufficient to establish said appraised values, and a certificate made and filed in the office of the corporation by such appraiser, that said property was appraised, setting forth the appraised value thereof, together with a detailed statement of the various items of property appraised with their individual values, shall be conclusive evidence of the appraised value of said property for the purpose of the issuance of said stock and for all other purposes. Before the issuance of any such stock, the President of the corporation shall file a certificate in the office of the corporation setting forth in detail the property purchased or to be purchased with the proceeds of the sale of such stock.

“If the corporation shall sell or exchange any of its property, it will within such reasonable time as it may require, do one or more or any combination of the following: (a) substitute for such property so sold or exchanged property of substantially such sale or exchange value; such sale or exchange value to be determined by an appraisement thereof made in the manner, with the effect, and by an appraiser selected as provided elsewhere in this Article Fourth: (b) purchase with the proceeds of such sale preferred stock of the corporation as permitted by this certificate; (c) purchase with the proceeds of such sale bonds of the corporation as

may be permitted by any indenture or mortgage securing the same.

“Said 6½% Cumulative Preferred Serial Stock shall be entitled to receive in each year out of the surplus or net profits of the business of the corporation, dividends at the rate of 6½% per annum, and no more, upon the par value of said stock from date of issue, payable quarterly as [73] follows: On October 1st, January 1st, April 1st, and July 1st of each year.

“The dividends on all of the preferred stock of the corporation shall be cumulative, so that if in any year or years the dividends thereon shall not have been paid, such dividends shall be paid in full before any dividends shall be paid or set apart from the common stock. The amount of any serial redemption of said preferred stock, if overdue, shall be paid before any dividends shall be paid or set apart on the common stock.

“Whenever the dividends upon all of the then issued and outstanding preferred stock for all past dividend periods shall have been declared, and the same shall have been paid by the corporation or the funds therefor set aside, the Board of Directors may declare dividends upon the common stock, payable at such a time as the Board may fix, out of any remaining surplus or net profits, provided that no dividends shall be declared, set apart, or paid on the common stock, and the holders thereof shall not be entitled to receive dividends thereon, until an amount equal to the amount or two full yearly

dividends on the then issued and outstanding preferred stock of the corporation shall have been set aside or deposited and maintained with Pacific Southwest Trust & Savings Bank, or such other trust company doing business in Los Angeles as the Board of Directors of the corporation shall by resolution designate.

“In the event of any liquidation, dissolution, or winding up of the corporation, whether voluntary or involuntary, the holders of record of said 6½% Cumulative Preferred Serial Stock shall be entitled, before any distribution shall be made to the holders of the common stock, to be paid out of the surplus profits arising from the business of this corporation and then remaining intact, or in case such profits shall be insufficient, then from the general assets of this corporation, an amount equal to 105% of the par value of said stock.

“The whole or any part of the 6½% Cumulative Preferred Serial Stock may be redeemed on any dividend date upon the payment of 105% per share, plus all unpaid, accrued, or accumulated dividends thereon. At least thirty (30) days notice of such redemption shall be given by mail, at their respective addresses as shown on the books of the corporation, to the stockholders of record on the books of this corporation whose stock is redeemed, and such notice shall also be given by publication in a newspaper of general circulation published in the City of Los Angeles, and in a newspaper of general circulation published in the City of San Francisco,

State of California, once a week for at least thirty (30) days prior to the date fixed for such redemption. Such redemption shall be by such method as shall be provided from time to time by resolution of the Board of Directors of the corporation, and at such time and place as shall be specified in the notice. From and after the date fixed in [74] any such notice as the date of redemption, unless default shall be made by this corporation in providing moneys at the time and place as aforesaid for the payment of the redemption price of said stock, all dividends on such stock so called for redemption shall cease to accrue, and from and after said date all the rights of the holders thereof as stockholders of this corporation, except the right to receive such redemption price, shall cease and determine. All numbers of the certificates of said preferred stock so redeemed shall be appropriately cancelled on the books of this corporation and the stock evidenced thereby shall not be reissued.

“The whole or any part of the 6½% Cumulative Preferred Serial Stock may be purchased by the corporation at any time by purchase upon the open market at not to exceed 105% of the par value of said stock, plus unpaid, accrued, and accumulated dividends thereon, provided, however, that in no case shall the corporation purchase stock in the open market, or use its funds or property for the purchase of said stock, when such use would cause an impairment of the capital of the corporation. Such stock, when so purchased, shall be cancelled as

redeemed stock, and when so cancelled shall not be reissued.

“On the 1st day of July, 1929, all of the Eleven Hundred (1100) shares of Series A, 6½% Cumulative Preferred Serial Stock then outstanding shall be redeemed at par, plus unpaid, accrued, and accumulated dividends thereon. Such redemption shall be made at the office of the corporation at the City of Los Angeles, State of California, and from and after said date, unless default shall be made by the corporation in providing moneys at said time and place for the payment of the redemption price of said stock, all dividends on said Series A, 6½% Cumulative Preferred Serial Stock shall cease and determine, and from and after said date all the rights of the holders thereof as stockholders of the corporation, except the right to receive such redemption price, shall cease and determine. All numbers of the certificates of said Series A, 6½% Cumulative Preferred Serial Stock so redeemed shall be appropriately cancelled on the books of this corporation, and the stock evidenced thereby shall not be reissued.

“In the event that the corporation shall fail to redeem said Series A, 6½% Cumulative Preferred Serial Stock at such time and place, the holders thereof shall have the right to enforce payment of the par value of said stock so agreed to be redeemed, together with the amount of any unpaid, accrued, or accumulated dividends thereon, the same as on any unconditional claim or debt against the cor-

poration, and upon payment thereof the right of the holders thereof as stockholders of the corporation shall cease and determine and said Series A, 6½% Cumulative Preferred Serial Stock so paid shall be appropriately cancelled upon the books of the corporation and said stock shall not be reissued.

“The corporation shall also redeem, on the 1st day of [75] July of each of the respective years 1930 to 1951, both inclusive, all of the outstanding shares of said respective Series B to W, both inclusive, 6½% Cumulative Preferred Serial Stock, upon the same terms and conditions, except as to the year of redemption, as are herein provided for said Series A, and the holders of each of said respective series shall have the same rights with respect thereto as are hereinbefore conferred upon the holders of Series A.

“So long as said dividends on said preferred stock shall be paid as herein provided, the holders of the preferred stock shall have no voting power on any question, except as provided by statute, or by this certificate, but on the contrary, the sole and exclusive voting power shall be vested in the holders of the common stock, but should any dividend on any preferred stock be not paid when payable as herein provided, and remain unpaid for ninety (90) days thereafter, then and so long as such dividend, or any part thereof, remains unpaid, the issued and outstanding preferred stock shall be exclusively entitled to the voting power, except as otherwise provided by statute, but upon such dividend, or unpaid

part thereof, being paid, the voting power of the preferred stock shall cease and the voting power reinvest in the common stock, and so on from time to time as said dividend, or part thereof, may remain unpaid, or may be paid as aforesaid.

“No shares of said preferred stock shall enjoy any preference over any other shares of said preferred stock.

“The preferred stock shall be issued as, and shall be, fully paid up and non-assessable.

“The shares of common stock, without nominal or par value, may be issued by the corporation from time to time for such consideration as may be fixed from time to time by the Board of Directors.” [76]

INCORPORATED UNDER THE LAWS OF
THE STATE OF DELAWARE
MAY 31, 1929

No. 17

Pacific Southwest Realty Company

PREFERRED STOCK \$5,000,000 - 50,000 SHARES
PAR VALUE \$100.00 EACH

COMMON STOCK 50,000 SHARES - WITHOUT
NOMINAL OR PAR VALUE PER SHARE

Shares

Date

1942

CELLED

TRANSFERRED TO

24

SECRETARY

This Certifies that

Shares of the Common Stock of the PACIFIC SOUTHWEST REALTY COMPANY, a corporation, with nominal or par value, transferable only on the books of the Corporation by the holder hereof in person or by attorney, on the surrender of this certificate properly endorsed. The 6 1/2% Cumulative Preferred Serial Stock shall be issued by the Corporation in twenty-three (23) series, to be designated by letters A to W, both inclusive, and each series shall be for the respective number of shares, and redeemable at their par value plus all unpaid, accrued, or accumulated dividends thereon, on the respective dates as follows:

Series	No. Shares	Redeemable	Series	No. Shares	Redeemable	Series	No. Shares	Redeemable	Series	No. Shares	Redeemable	Series	No. Shares	Redeemable	Series	No. Shares	Redeemable
A	1,000	July 1, 1929	E	1,500	July 1, 1933	I	1,000	July 1, 1937	M	2,000	July 1, 1941	O	3,000	July 1, 1945	U	3,000	July 1, 1949
B	1,100	July 1, 1930	F	1,550	July 1, 1934	J	1,700	July 1, 1938	N	2,200	July 1, 1942	P	3,500	July 1, 1946	V	4,500	July 1, 1950
C	1,200	July 1, 1931	G	1,600	July 1, 1935	K	1,750	July 1, 1939	O	2,300	July 1, 1943	Q	3,600	July 1, 1947	W	5,000	July 1, 1951
D	1,300	July 1, 1932	H	1,650	July 1, 1936	L	1,700	July 1, 1940	R	2,400	July 1, 1944	S	3,700	July 1, 1948			

The 6 1/2% Cumulative Preferred Serial Stock shall be entitled to receive in each year out of the surplus or net profits of the business of the corporation, dividends at the rate of 6 1/2% per annum, and no more, upon the par value of said stock from date of issue, payable quarterly as follows: On October 1st, January 1st, April 1st, and July 1st of each year. The dividends on all of the preferred stock of the corporation shall be cumulative so that if in any year or years the dividends thereon shall not have been paid, such dividends shall be paid in full before any dividends shall be paid or set apart upon the common stock. The amount of any partial redemption of said preferred stock, if ordered, shall be paid before any dividends shall be paid on the common stock.

Whenever the dividends upon all of the then issued and outstanding preferred stock for all past dividend periods shall have been declared, and the same shall have been paid by the corporation or the funds thereof set aside, the Board of Directors may declare dividends upon the common stock, payable at such time as the Board may fix, out of any remaining surplus or net profits, provided that no dividends shall be declared, not paid, or paid on the common stock, and the holders thereof shall not be entitled to receive dividends thereon, until an amount equal to the amount of two full yearly dividends on the then issued and outstanding preferred stock of the corporation shall have been set aside or deposited and maintained with Pacific-Southwest Trust and Savings Bank, or such other trust company doing business in Los Angeles as the Board of Directors of the corporation shall by resolution designate.

Notwithstanding any limitation, restriction, or standing up of the corporation, whether voluntary or involuntary, the holders of record of said 6 1/2% Cumulative Preferred Serial Stock shall be entitled, before any dividends shall be made to the holders of the common stock, to be paid out of the surplus profits arising from the business of this corporation, and then remaining interest, or in case such profits shall be insufficient, then shall the general assets of this corporation, an amount equal to 100% of the par value of said stock. The whole or any part of the 6 1/2% Cumulative Preferred Serial Stock may be redeemed on any dividend date upon the surrendering of 100% per share, plus all unpaid, accrued, or accumulated dividends thereon, upon 30 days' notice.

The whole or any part of the 6 1/2% Cumulative Preferred Serial Stock may be purchased by the corporation at any time by purchase upon the open market at not to exceed 105% of the par value of said stock plus unpaid, accrued, and accumulated dividends thereon, provided, however, that in no case shall the corporation purchase stock in the open market, or use its funds or property for the purchase of said stock, when such purchase would cause an impairment of the capital of the corporation. Such stock, when so purchased, shall be cancelled.

Notwithstanding any limitation, restriction, or standing up of the corporation, whether voluntary or involuntary, the holders of record of said 6 1/2% Cumulative Preferred Serial Stock shall be entitled, before any dividends shall be made to the holders of the common stock, to be paid out of the surplus profits arising from the business of this corporation, and then remaining interest, or in case such profits shall be insufficient, then shall the general assets of this corporation, an amount equal to 100% of the par value of said stock. The whole or any part of the 6 1/2% Cumulative Preferred Serial Stock may be redeemed on any dividend date upon the surrendering of 100% per share, plus all unpaid, accrued, and accumulated dividends thereon, upon 30 days' notice.

The whole or any part of the 6 1/2% Cumulative Preferred Serial Stock may be purchased by the corporation at any time by purchase upon the open market at not to exceed 105% of the par value of said stock plus unpaid, accrued, and accumulated dividends thereon, provided, however, that in no case shall the corporation purchase stock in the open market, or use its funds or property for the purchase of said stock, when such purchase would cause an impairment of the capital of the corporation. Such stock, when so purchased, shall be cancelled.

Notwithstanding any limitation, restriction, or standing up of the corporation, whether voluntary or involuntary, the holders of record of said 6 1/2% Cumulative Preferred Serial Stock shall be entitled, before any dividends shall be made to the holders of the common stock, to be paid out of the surplus profits arising from the business of this corporation, and then remaining interest, or in case such profits shall be insufficient, then shall the general assets of this corporation, an amount equal to 100% of the par value of said stock. The whole or any part of the 6 1/2% Cumulative Preferred Serial Stock may be redeemed on any dividend date upon the surrendering of 100% per share, plus all unpaid, accrued, and accumulated dividends thereon, upon 30 days' notice.

The whole or any part of the 6 1/2% Cumulative Preferred Serial Stock may be purchased by the corporation at any time by purchase upon the open market at not to exceed 105% of the par value of said stock plus unpaid, accrued, and accumulated dividends thereon, provided, however, that in no case shall the corporation purchase stock in the open market, or use its funds or property for the purchase of said stock, when such purchase would cause an impairment of the capital of the corporation. Such stock, when so purchased, shall be cancelled.

Notwithstanding any limitation, restriction, or standing up of the corporation, whether voluntary or involuntary, the holders of record of said 6 1/2% Cumulative Preferred Serial Stock shall be entitled, before any dividends shall be made to the holders of the common stock, to be paid out of the surplus profits arising from the business of this corporation, and then remaining interest, or in case such profits shall be insufficient, then shall the general assets of this corporation, an amount equal to 100% of the par value of said stock. The whole or any part of the 6 1/2% Cumulative Preferred Serial Stock may be redeemed on any dividend date upon the surrendering of 100% per share, plus all unpaid, accrued, and accumulated dividends thereon, upon 30 days' notice.

The whole or any part of the 6 1/2% Cumulative Preferred Serial Stock may be purchased by the corporation at any time by purchase upon the open market at not to exceed 105% of the par value of said stock plus unpaid, accrued, and accumulated dividends thereon, provided, however, that in no case shall the corporation purchase stock in the open market, or use its funds or property for the purchase of said stock, when such purchase would cause an impairment of the capital of the corporation. Such stock, when so purchased, shall be cancelled.

Notwithstanding any limitation, restriction, or standing up of the corporation, whether voluntary or involuntary, the holders of record of said 6 1/2% Cumulative Preferred Serial Stock shall be entitled, before any dividends shall be made to the holders of the common stock, to be paid out of the surplus profits arising from the business of this corporation, and then remaining interest, or in case such profits shall be insufficient, then shall the general assets of this corporation, an amount equal to 100% of the par value of said stock. The whole or any part of the 6 1/2% Cumulative Preferred Serial Stock may be redeemed on any dividend date upon the surrendering of 100% per share, plus all unpaid, accrued, and accumulated dividends thereon, upon 30 days' notice.

The whole or any part of the 6 1/2% Cumulative Preferred Serial Stock may be purchased by the corporation at any time by purchase upon the open market at not to exceed 105% of the par value of said stock plus unpaid, accrued, and accumulated dividends thereon, provided, however, that in no case shall the corporation purchase stock in the open market, or use its funds or property for the purchase of said stock, when such purchase would cause an impairment of the capital of the corporation. Such stock, when so purchased, shall be cancelled.

Notwithstanding any limitation, restriction, or standing up of the corporation, whether voluntary or involuntary, the holders of record of said 6 1/2% Cumulative Preferred Serial Stock shall be entitled, before any dividends shall be made to the holders of the common stock, to be paid out of the surplus profits arising from the business of this corporation, and then remaining interest, or in case such profits shall be insufficient, then shall the general assets of this corporation, an amount equal to 100% of the par value of said stock. The whole or any part of the 6 1/2% Cumulative Preferred Serial Stock may be redeemed on any dividend date upon the surrendering of 100% per share, plus all unpaid, accrued, and accumulated dividends thereon, upon 30 days' notice.

The whole or any part of the 6 1/2% Cumulative Preferred Serial Stock may be purchased by the corporation at any time by purchase upon the open market at not to exceed 105% of the par value of said stock plus unpaid, accrued, and accumulated dividends thereon, provided, however, that in no case shall the corporation purchase stock in the open market, or use its funds or property for the purchase of said stock, when such purchase would cause an impairment of the capital of the corporation. Such stock, when so purchased, shall be cancelled.

Notwithstanding any limitation, restriction, or standing up of the corporation, whether voluntary or involuntary, the holders of record of said 6 1/2% Cumulative Preferred Serial Stock shall be entitled, before any dividends shall be made to the holders of the common stock, to be paid out of the surplus profits arising from the business of this corporation, and then remaining interest, or in case such profits shall be insufficient, then shall the general assets of this corporation, an amount equal to 100% of the par value of said stock. The whole or any part of the 6 1/2% Cumulative Preferred Serial Stock may be redeemed on any dividend date upon the surrendering of 100% per share, plus all unpaid, accrued, and accumulated dividends thereon, upon 30 days' notice.

The whole or any part of the 6 1/2% Cumulative Preferred Serial Stock may be purchased by the corporation at any time by purchase upon the open market at not to exceed 105% of the par value of said stock plus unpaid, accrued, and accumulated dividends thereon, provided, however, that in no case shall the corporation purchase stock in the open market, or use its funds or property for the purchase of said stock, when such purchase would cause an impairment of the capital of the corporation. Such stock, when so purchased, shall be cancelled.

EXHIBIT "D"

The First National Bank of Los Angeles
Pacific-Southwest Trust & Savings Bank
First Securities Company

Los Angeles

Jun. 8, 1923 I.R.C.

The growth of our business necessitates the provision of additional facilities at many points where we now operate if our customers are to be adequately and efficiently cared for. This will require a further substantial investment in real estate and buildings suitable for bank premises in the next few years, in addition to our present holdings owned or held under contract, which are valued at approximately four million dollars.

The locking up of too great a proportion of our capital and surplus in such fixed assets as banking premises is thought to be inadvisable. Accordingly we have devised a plan which has received the approval of the Boards of Directors of both our banking institutions, whereby the banks' present and prospective investment in real estate and buildings suitable for bank purposes may be released and the funds now invested therein be utilized for general banking purposes.

Through the medium of a subsidiary company and the employment of outside capital for a period of years, this may be accomplished with benefit to our stockholders and without sacrificing in any way at any time entire control of our bank premises while ultimately complete ownership is attained.

We have, therefore, organized the Pacific Southwest Realty Company for the purpose of taking over from our banks the real estate and buildings owned by us and utilized wholly or in part in the conduct of our banking business. The acquisition of additional property in the future suitable for banking premises, and the construction of buildings thereon will likewise be undertaken by the Realty Company and will be financed by it without recourse to the banks' funds.

From and after July 1, 1923, the above properties will be owned and operated by the Pacific Southwest Realty Company, which will lease to the Pacific-Southwest Trust & Savings Bank those properties now occupied as bank premises, for an annual rental which shall always be sufficient, when combined with the revenue which may be obtained from other sources, to pay all operating costs, upkeep, maintenance, repairs, taxes and insurance on the different properties and also all interest and dividend and amortization charges on the securities to be issued by the Realty Company. Under the terms of this lease all securities issued by the Realty Company will be retired within thirty years, leaving the properties free and clear of indebtedness.

The entire common stock of the Pacific Southwest Realty Company will be owned by the First Securities Company, which is owned by holders of our Beneficial Certificates, thus maintaining their proportionate interest in all our institutions. [79]

The capitalization of the Pacific Southwest Realty Company will consist of an authorized issue of

\$5,000,000 6½% Cumulative Preferred Serial stock and an authorized issue of \$3,000,000 First Mortgage 5½% Serial bonds, Series "A", and 50,000 shares of common stock of no par value.

To provide funds with which to purchase from The First National Bank of Los Angeles and the Pacific-Southwest Trust & Savings Bank for cash at their appraised valuation their various bank premises and to provide for additional banking facilities, the Realty Company will issue at this time \$3,000,000 First Mortgage 5½% bonds and \$3,000,000 6½% Cumulative Preferred Serial Stock. It is our intention to finance our present needs through the issuance of approximately equal amounts of Preferred stock and bonds. The balance of the Preferred stock will be reserved for issuance under conservative restrictions as our building program may require. We believe that we have provided for our legitimate needs in this direction for some years to come.

Of the above securities, only the \$3,000,000 6½% Cumulative Preferred Serial stock will be offered for subscription, favorable arrangements having been made for the sale to one institution (not our own) of the entire authorized bond issue. We have thought it proper to give our stockholders the prior right to subscribe to the 6½% Cumulative Preferred Serial stock before any public offering is made. The entire block of \$3,000,000 Preferred stock has, however, been underwritten by leading California Investment Banking Houses who will later offer to the public whatever amount is not sub-

scribed by our stockholders at the same price at which this offering is made, viz., \$100 for each share.

No effort has been spared to make this stock as safe intrinsically as it could possibly be made while the price is fixed to correspond to prevailing market conditions. A complete description of the stock is contained in the enclosed circular memorandum and we shall be glad to answer any further questions which you may desire to ask about this security.

From this statement of the plan you will, of course, appreciate that the rental contract with the Pacific-Southwest Trust & Savings Bank assures the payment of interest and dividends and the final retirement of all securities issued by the Realty Company, and I believe that the opportunity to obtain on a profitable income basis a short or long term investment of this character will prove attractive to our stockholders.

You are invited to indicate on the enclosed subscription agreement the amount of stock you desire and the maturities you prefer. Insofar as possible, allotments will be made in accordance with your wishes. This subscription offer is open to stockholders until July 1st. On or before July 10, 1923, subscribers will receive notice of definite allotments and a call for payment in full at the rate of \$100 for each share allotted. Dividends will accrue from date of payment.

Yours sincerely,

HENRY M. ROBINSON

President [80]

EXHIBIT "E"

\$3,000,000

Pacific Southwest Realty Company

6½% Cumulative Preferred Serial Stock

Par Value \$100 Per Share

Authorized \$5,000,000. Present Issue \$3,000,000.

Preferred as to assets and dividends, and in event of liquidation entitled to receive \$105 per share. Dividends at the rate of 6½% are cumulative and payable quarterly on the first days of October, January, April and July. Callable, in whole or in part, on any dividend date upon 30 days' notice, at \$105 per share, plus accrued dividends. Stock may be transferred at the Company's office, 902 Trust and Savings Building, Los Angeles.

In Opinion of Counsel, Exempt from Normal Federal Income Tax and Exempt from Personal Property Tax in California

Pacific-Southwest Trust & Savings Bank,
Los Angeles, Registrar

This stock is issued in series, designated "A" to "W" inclusive, maturing July 1, 1929, to July 1, 1951, respectively.

Mr. Henry M. Robinson, President of the Company, summarizes as follows, from his accompanying letter, the essential features of the issue:

History

The Pacific Southwest Realty Company (a Delaware Corporation) has been organized for the purpose of acquiring and thereafter owning and operating all the real estate properties now owned by the Pacific-Southwest Trust & Savings Bank and one parcel owned by The First National Bank of Los Angeles. The Company will also undertake the providing of additional bank premises and buildings, as the growth of these banks may require.

Purpose of Issue

The proceeds from the present issue of securities will be used in part to acquire from the Pacific-Southwest Trust & Savings Bank title to real estate and buildings with an appraised valuation, as accepted by the Superintendent of Banks of California, of approximately \$4,000,000, and consisting, among others, of the Trust and Savings Building located on the northwest corner of Sixth and Spring Streets, Los Angeles. The balance of the proceeds will be used for the erection of additional suitable banking structures and for the acquisition of additional property suitable for the essential purposes of the Realty Company.

Lease

The properties to be acquired from the banks will be leased to the Pacific-Southwest Trust & Savings Bank for a period of 30 years from July 1, 1923. Under the terms of this lease, the interest on the bonds, the dividends on the Preferred Stock issued by the Realty Company and the annual maturities of stock and bonds are assured by the rental contract.

Special Provisions

The total amount of Preferred Stock at any time outstanding together with the total outstanding bonded indebtedness of the Company shall not combined exceed 100% of the appraised value of the properties of the Company, as accepted by the Superintendent of Banks or by the Commissioner of Corporations of California or by their successors.

The serial maturities of both Preferred Stock and First Mortgage Bonds provide a constantly increasing equity for the securities remaining outstanding.

No dividends may be paid on the Common Stock of the Company until:

1. All dividends on the Preferred Stock have been paid,
2. All matured stock has been redeemed,
3. There shall have been set aside or deposited and maintained with the Pacific-Southwest Trust & Savings Bank, an amount equal

to the amount of two full yearly dividends on the then outstanding Preferred Stock.

This stock shall be issued as fully paid-up and non-assessable. No additional Preferred Stock can be authorized without the consent of two-thirds of the holders of the outstanding Preferred Stock.

Should the dividends on the Preferred Stock remain unpaid for a period of ninety days after the date when such dividends are payable, the outstanding Preferred Stock enjoys exclusive voting power until any arrears in payment are extinguished.

Ownership and Management

The entire issue of Common Stock, which enjoys the sole voting power, is owned by the First Securities Company, which is owned entirely by the holders of First National Bank Beneficial Certificates. The management of the Pacific Southwest Realty Company will be under the direction of Mr. Henry M. Robinson, President, and other officers and directors of The First National Bank of Los Angeles and the Pacific-Southwest Trust & Savings Bank.

All legal proceedings pertaining to the issuance of this stock have been approved by Messrs. Farrand and Slosson, Attorneys, Los Angeles.

We recommend this stock for investment and offer

the unsold portion of this issue, subject to prior sale and to allotment, at

Price Upon Application

First Securities Company

Identical in Ownership With

The First National Bank of Los Angeles

Pacific-Southwest Trust & Savings Bank

Orders may be placed at any office of these banks

Trust and Savings Building, Los Angeles

Telephone 822-361

Pasadena

Long Beach

Fresno

Hollywood

Santa Barbara

Redlands

[81]

Pacific Southwest Realty Company

History

The Pacific-Southwest Realty Company has been incorporated under the laws of Delaware for the purpose of acquiring and thereafter owning and operating all of the real estate properties now owned by the Pacific-Southwest Trust & Savings Bank and occupied, either wholly or in part, by the bank and its branches, and one parcel owned by The First National Bank of Los Angeles. The Company will also undertake the providing of additional bank premises and buildings from time to time, as the

growth of these banks may require. The necessary funds for these purposes will be secured through the sale of the Preferred Stock and Bonds of the Company.

Properties

The proceeds of the present issues of securities will be used in part to acquire from the Pacific-Southwest Trust & Savings Bank title to real estate and buildings with an appraised valuation, as accepted by the Superintendent of Banks of California, of approximately \$4,000,000, and consisting of the Trust and Savings Building located on the northwest corner of Sixth and Spring Streets, Los Angeles, and several other sites utilized by city branches, and also real estate or bank premises at the following twenty-three out of town branch locations, all of which are now owned by the Pacific-Southwest Trust & Savings Bank:

Alhambra	Lindsay
Carpinteria	Lompoc
El Centro	Los Alamos
Fresno	Ocean Park
Glendale	Orcutt
Guadalupe	Oxnard
Hanford	Pasadena
Lemoore	Redlands
San Luis Obispo	Venice
San Pedro	Whittier
Santa Maria	Visalia
Tulare	

The Realty Company will also acquire from The First National Bank of Los Angeles one parcel of real estate at Highland Avenue and Hollywood Boulevard, Hollywood, now occupied by its Hollywood agency.

The balance of the proceeds will be utilized for the erection of suitable banking structures at points where the growth of business has rendered present quarters inadequate and for the acquisition of additional property suitable for the essential purposes of the Realty Company.

Lease

The above properties to be acquired from the banks and thereafter to be owned and managed by the Realty Company will be leased to the Pacific-Southwest Trust & Savings Bank for a period of 30 years from July 1, 1923, at an annual rental which shall always be sufficient, when combined with the revenue received by the Realty Company from other sources, to pay operating costs of the Realty Company, maintenance, upkeep, repairs, taxes and insurance on the properties owned by it and in addition all interest and dividend and amortization charges on the outstanding bonds and Preferred Stock issued by the Realty Company. In other words, under the terms of this lease the interest on the bonds, the dividends on the Preferred Stock and the annual maturities of stock and bonds are assured by the rental contract with the Pacific-Southwest Trust & Savings Bank.

Capitalization

The capitalization of the Pacific Southwest Realty Company will consist of:

	Authorized	To be Issued Presently
First Mortgage 5½% Bonds, Series "A," maturing serially 1924 to 1953 inclusive.....	\$3,000,000	\$3,000,000
6½% Cumulative Preferred Serial Stock	5,000,000	3,000,000
Common Stock, no par value.....	50,000 shrs.	50,000 shrs.

The remaining Preferred Stock will be held in the Company's treasury for issuance, from time to time, as the needs of the Company may require, but only in accordance with the strict provisions governing the issue of the stock and bonds and which at all times protect the equity of the holder of such securities.

Description of Preferred Stock

The Preferred Stock of the Company is preferred both as to assets and dividends. It is issued in series of various amounts which have a definite maturity on July 1st in each of the years from 1929 to 1951 inclusive. On each maturity date the entire series which becomes due is redeemed by the Company at \$100 per share and canceled. The Company may, however, call any or all of its outstanding Preferred Stock for redemption on any dividend date on thirty days' notice at \$105 per share, plus accrued dividends, and all certificates of stock so redeemed shall be canceled.

All or any part of the Preferred Stock may be purchased by the Company upon the open market at not to exceed \$105 per share plus accumulated dividends, provided that such stock when so purchased shall be canceled and shall not thereafter be reissued.

In the event of any liquidation or dissolution of the Company, whether voluntary or involuntary, the Preferred Stock is entitled to receive \$105 per share plus accrued dividends out of the assets of the Company.

The stock may be transferred at the Company's office, 902 Trust and Savings Bldg., Los Angeles. The Pacific-Southwest Trust & Savings Bank is Registrar.

Tax Exemption

The 6½% Cumulative Preferred Serial Stock is, in opinion of counsel, free from the Personal Property Tax in California and likewise free from the Normal Federal Income Tax.

Dividends

Dividends at the rate of 6½% are cumulative and are payable quarterly to stockholders on the first days of October, January, April and July.

Special Provisions

1. No shares of Preferred Stock shall enjoy any preferences over any other shares of Preferred Stock.

2. Preferred stock shall be issued as fully paid up and non-assessable.

3. No additional Preferred Stock can be authorized nor the preferences altered without the consent of two-thirds of the holders of the outstanding Preferred Stock. [82]

4. The Common Stock of the Company may receive dividends only when all Preferred Stock dividends have been paid, all matured stock redeemed and in addition only after an amount equal to the amount of two full yearly dividends on the then outstanding Preferred Stock shall have been set aside or deposited and maintained with the Pacific-Southwest Trust & Savings Bank.

5. Should the dividends on the Preferred Stock remain unpaid for a period of ninety days after the date when such dividends are payable, the outstanding Preferred Stock enjoys exclusive voting power until any arrears in payment are extinguished.

6. In the event of failure to redeem any series of Preferred Stock on the maturity date, the holders thereof have the right to enforce the payment, as in the case of any unconditional claim or debt against the Company.

Equity

Every effort has been made to make the Preferred Stock as sound an investment security as possible, and having established its safety at the outset to provide that the stockholders' equity will never be impaired. To this end the Articles of Incorporation provide that the issuance of securities

is to be based on the appraisalment of the properties made as of the date the Realty Company acquires such properties. Such appraisalment will be made by an appraiser selected by the Superintendent of Banks or by the Commissioner of Corporations of California or by their successors.

The clauses which protect the stockholders' equity are as follows:

(a) The amount of Preferred Stock to be issued shall not exceed 100% of the appraised value of the property purchased or to be purchased with the proceeds of the sale of such Preferred Stock.

(b) The aggregate indebtedness of the corporation secured by mortgage, deed of trust or otherwise, shall not exceed in amount 50% of the appraised value of the property subject thereto.

(c) The total amount, however, of Preferred Stock at any time outstanding under (a), together with the total outstanding bonded indebtedness of the Company that may be issued under paragraph (b), shall not combined exceed 100% of the appraised value of the properties as established above.

It is the intention of the Realty Company to finance its present needs by equal amounts of Preferred Stock and Bonds, i.e., 50% of Preferred Stock and 50% of Bonds. The annual maturities of bonds and stocks will serve to increase the original equity as the different series mature and are retired.

If the corporation sells or exchanges any of its property, it will within a reasonable time substitute for such property so sold or exchanged property of substantially equal value or retire with the proceeds of such sale Preferred Stock and/or Bonds.

Additional Preferred Stock can only be issued for cash for the purpose of acquiring with the proceeds of the sale thereof property suitable for the essential purposes of the Company, and further provided that the above provisions as to appraisal and the ratios of outstanding stocks and bonds are maintained.

Ownership and Management

The entire issue of Common stock, which enjoys the sole voting power, is owned by the First Securities Company, which is owned entirely by the holders of First National Bank Beneficial Certificates. The management of the Pacific Southwest Realty Company will be under the direction of Mr. Henry M. Robinson, President, and other officers and directors to be chosen from the officers and directors of The First National Bank of Los Angeles and the Pacific-Southwest Trust & Savings Bank.

Amounts and Maturities

The 6½% Cumulative Preferred Serial Stock of the Pacific Southwest Realty Company now to be offered is of the following amounts and maturities:

Series	Maturity	Authorized	Offered for Subscription
A	July 1, 1929	\$ 110,000	\$ 66,000
B	July 1, 1930	110,000	66,000
C	July 1, 1931	110,000	66,000
D	July 1, 1932	110,000	66,000
E	July 1, 1933	125,000	75,000
F	July 1, 1934	125,000	75,000
G	July 1, 1935	125,000	75,000
H	July 1, 1936	140,000	84,000
I	July 1, 1937	140,000	84,000
J	July 1, 1938	170,000	102,000
K	July 1, 1939	170,000	102,000
L	July 1, 1940	170,000	102,000
M	July 1, 1941	200,000	120,000
N	July 1, 1942	230,000	138,000
O	July 1, 1943	230,000	138,000
P	July 1, 1944	260,000	156,000
Q	July 1, 1945	290,000	174,000
R	July 1, 1946	305,000	183,000
S	July 1, 1947	335,000	201,000
T	July 1, 1948	365,000	219,000
U	July 1, 1949	395,000	237,000
V	July 1, 1950	445,000	267,000
W	July 1, 1951	340,000	204,000
Total.....		\$5,000,000	\$3,000,000

Legality

All legal proceedings pertaining to the issuance of this stock have been approved by Messrs. Far-
rand and Slosson, Attorneys, Los Angeles.

Yours very truly,

HENRY M. ROBINSON

President [83]

[Picture of Building]

Trust and Savings Building

Located on the Northwest Corner of
Sixth and Spring Streets
Los Angeles

One of the properties to be acquired by the
Pacific Southwest Realty Company

EXHIBIT "F"

PORTIONS OF LEASE DATED JULY 1, 1923
UNDER WHICH PETITIONER LEASED
CERTAIN OF ITS PROPERTIES TO PA-
CIFIC SOUTHWEST TRUST AND SAV-
INGS BANK

"This Lease, made in duplicate, as of July 1, 1923, between Pacific Southwest Realty Company, a corporation, herein referred to as Lessor, and Pacific-Southwest Trust & Savings Bank, a corporation, herein referred to as Lessee, witnesseth:

"Lessor owns certain real estate and buildings in the various cities and communities in which

Lessee is engaged in the banking business; Lessee desires to lease these properties, either in whole or in part, for its banking purposes and for use by any of its affiliated or subsidiary corporations and for other purposes. Lessor is willing to lease said property if it can be assured of a rental which shall always be sufficient, when combined with the revenues received by it from other sources, to pay all of its operating costs, all maintenance, upkeep, repairs, taxes, and insurance on the properties owned by it, and in addition, all interest, dividend, and amortization charges on its outstanding bonds and preferred stock;

“That the lessor, in consideration of the payment of the rent hereinafter specified to be paid by the Lessee, and the covenants and agreements hereinafter contained to be kept and performed by the Lessee, and other valuable adequate consideration, does by these presents demise, lease, and let, upon the terms, provisions and conditions hereinafter set forth, unto the Lessee, those certain premises situate in the State of California particularly described as follows:

* * * * *

(Description of Properties)

“1. Term of Lease. The term of this lease is and shall be Thirty (30) years from and after July 1, 1923, and ending on June 30, 1953, unless sooner terminated in accordance with the provisions hereof.

“2. Rent. Lessee agrees to pay rent for said premises and Lessor to accept said rent therefor as follows:

“Four Hundred Twenty Thousand Dollars (\$420,000.00) per annum during said term; payable in twelve (12) equal installments during each of said years, the payment for the month of July, 1923, to be made on the 20th day of July, 1923, and the payment for each of the following months to be made on the corresponding day of each of said months; the sum of Four Hundred Twenty Thousand [84] Dollars (\$420,000.00) is herein referred to as the ‘estimated rental’, and is the amount which Lessor and Lessee have estimated will give to Lessor the amount of rental referred to in the witness clause hereof; the actual rental will be adjusted accordingly, so that if the ‘estimated rental’ in any year is more or less than sufficient, when combined with the revenue received by Lessor from other sources, to pay all operating costs of Lessor, maintenance, upkeep, repairs, taxes, (including special assessments), and insurance on the properties owned by it, and in addition all interest, dividend, and amortization charges on its outstanding bonds and preferred stock issued or to be issued by it, the actual amount to be paid by Lessee to Lessor and received by Lessor hereunder will be adjusted accordingly; such adjustment to be made within thirty (30) days after July 1st of each year of said term, beginning July 1, 1924, upon a statement prepared by the Lessor. * * *” [85]

EXHIBIT "G"

ARTICLE FOURTH OF THE CERTIFICATE
OF INCORPORATION OF PETITIONER
AS AMENDED DECEMBER 16, 1927

"Fourth: The total authorized capital stock of this corporation is One Hundred twenty-five thousand (125,000) shares, divided into seventy-five thousand (75,000) shares of preferred stock of the par value of One Hundred Dollars (\$100.00) each, amounting in the aggregate to Seven Million Five hundred thousand dollars (\$7,500,000.00), and Fifty thousand (50,000) shares of common stock, which shares shall have no nominal or par value. The description of said classes of stock, and the designations, preferences, and restrictions, if any, and the voting power or restrictions or qualifications of such preferred stock and common stock, together with all other rights of such preferred stock and common stock, are as follows:

6½% Cumulative Preferred Serial Stock. Fifty thousand (50,000) shares of said preferred stock shall be designated '6½% Cumulative Preferred Serial Stock.' Said 6½% Cumulative Preferred Serial Stock shall be issued by the corporation in Twenty-three (23) series, to be designated by letters A to W, both inclusive, and each series shall be for the respective number of shares, redeemable at their par value plus all unpaid, accrued or accumulated dividends thereon, on the respective dates as follows:

Series	No. of Shares	Redeemable On
A.....	1,100	July 1, 1929
B.....	1,100	July 1, 1930
C.....	1,100	July 1, 1931
D.....	1,100	July 1, 1932
E.....	1,250	July 1, 1933
F.....	1,250	July 1, 1934
G.....	1,250	July 1, 1935
H.....	1,400	July 1, 1936
I.....	1,400	July 1, 1937
J.....	1,700	July 1, 1938
K.....	1,700	July 1, 1939
L.....	1,700	July 1, 1940
M.....	2,000	July 1, 1941
N.....	2,300	July 1, 1942
O.....	2,300	July 1, 1943
P.....	2,600	July 1, 1944
Q.....	2,900	July 1, 1945
R.....	3,050	July 1, 1946
S.....	3,350	July 1, 1947
T.....	3,650	July 1, 1948
U.....	3,950	July 1, 1949
V.....	4,450	July 1, 1950
W.....	3,400	July 1, 1951

“Twenty-five thousand (25,000) shares of said preferred stock may be issued from time to time in series as may from time to time be determined by resolution of the board of directors of this corporation, with variations as between each series in any one or more of the following particulars: [86]

(a) The designation of such series, which may be by distinguishing number, letter, or title as the board of directors may deem appropriate;

(b) The rate, which shall not exceed $6\frac{1}{2}\%$ per annum, at which dividends are to accrue thereon; and

(c) Not exceeding \$5.00 per share payable as a premium in case of the redemption of said stock, or upon a voluntary liquidation, dissolution, or winding up of this corporation or reduction of its capital stock resulting in any distribution of its assets to its stockholders, which amount, in respect of any series, may, but need not, vary according to the time or circumstances of such action.

“If and whenever from time to time the board of directors shall determine to issue preferred stock other than said 6½% Cumulative Preferred Serial Stock, it shall, prior to the issuance of any shares of each such series, by resolution or resolutions, fix the terms of such series, in the particulars above mentioned, and shall cause the same to be set forth in such additional certificate or certificates, if any, as shall at the time be required by law.

“The rate of dividend to be paid upon said 6½% Cumulative Preferred Serial Stock and upon said other stock at whatever rate, not exceeding said six and one-half per cent (6½%), shall be fixed for the same is hereby referred to as the ‘fixed dividend rate,’ and the amount or amounts so fixed and/or to be hereafter fixed as the redemption premium payable upon the redemption of any of said preferred stock is hereby referred to as the ‘fixed redemption premium.’

“Said preferred stock may be issued as and when the board of directors of the corporation shall de-

termine, but no preferred stock shall be issued except for the purpose of acquiring with the proceeds of the sale thereof property suitable for one or more of the purposes of the corporation. Said preferred stock shall be issued for cash at not less than ninety-two per cent (92%) of the par value of said stock. The amount of preferred stock to be issued for such purpose shall not exceed, however, one hundred per cent (100%) of the appraised value of the property purchased, or to be purchased, with such proceeds. The aggregate indebtedness of the corporation secured by mortgage, deed of trust, or otherwise, shall not exceed in amount Fifty per cent (50%) of the appraised value of the property subject thereto. The total amount of preferred stock of the corporation at any time outstanding shall not, together with the total bonded indebtedness of the corporation, exceed One Hundred per cent (100%) of the appraised value of the property of the corporation. Said appraisements shall be made as of the date the corporation acquires said property. The appraisement of such property by an appraiser selected by the Superintendent of Banks of California, or by the Commissioner of Corporations of California, or by any official which shall be the successor of either of said officials, or if there is no such official qualified to make the selection of such appraiser, or if such officials shall fail to select such appraiser, by an appraiser selected by the Trustee in any trust in-

indenture executed by the corporation to secure any of its bonded indebtedness, shall be sufficient to establish said appraised values, and a certificate made and filed in the office of the corporation by such appraiser that [87] said property was appraised, setting forth the appraised value thereof, together with a detailed statement of the various items of property appraised, with their individual values, shall be conclusive evidence of the appraised value of said property for the purpose of the issuance of said stock and for all other purposes. Before the issuance of any such stock the president of the corporation shall file a certificate in the office of the corporation setting forth in detail the property purchased or to be purchased with the proceeds of the sale of such stock.

“If the corporation shall sell or exchange any of its property, it will within such reasonable time as it may require, do one or more or any combination of the following: (a) substitute for such property so sold or exchanged property of substantially such sale or exchange value; such sale or exchange value to be determined by an appraisement thereof made in the manner, with the effect, and by an appraiser selected as provided elsewhere in this Article Fourth; (b) purchase with the proceeds of such sale preferred stock of the corporation as permitted by this certificate; (c) purchase with the proceeds of such sale bonds of the corporation as may be permitted by any indenture or mortgage securing the same.

“Said preferred stock shall be entitled to receive in each year out of the surplus or net profits of the business of the corporation, dividends at the fixed dividend rate per annum, and no more, upon the par value of said stock from date of issue, payable quarterly as follows: On October 1st, January 1st, April 1st, and July 1st of each year.

“The dividends on all of the preferred stock of the corporation shall be cumulative, so that if in any year or years the dividends thereon shall not have been paid, such dividends shall be paid in full before any dividends shall be paid or set apart upon the common stock. The amount of any serial redemption of said preferred stock, if overdue, shall be paid before any dividends shall be paid or set apart on the common stock.

“Whenever the dividends upon all of the then issued and outstanding preferred stock for all past dividend periods shall have been declared, and the same shall have been paid by the corporation or the funds therefor set aside, the board of directors may declare dividends upon the common stock, payable at such time as the board may fix, out of any remaining surplus or net profits, provided that no dividends shall be declared, set apart, or paid on the common stock, and the holders thereof shall not be entitled to receive dividends thereon, until an amount equal to the amount of two full yearly dividends on the then issued and outstanding preferred stock of the corporation shall have been set

aside or deposited and [88] maintained with Los Angeles-First National Trust & Savings Bank, or such other trust company doing business in Los Angeles as the Board of Directors of the corporation shall by resolution designate.

“In the event of any liquidation, dissolution, or winding up of the corporation, whether voluntary or involuntary, the holders of record of said preferred stock shall be entitled, before any distribution shall be made to the holders of the common stock, to be paid out of the surplus profits arising from the business of this corporation and then remaining intact, or in case such profits shall be insufficient, then from the general assets of this corporation, an amount equal to the par value thereof plus said fixed redemption premium, plus all unpaid, accrued, or accumulated dividends thereon.

“The whole or any part of the preferred stock may be redeemed on any dividend date upon the payment of the par value thereof plus said fixed redemption premium per share, plus all unpaid, accrued, or accumulated dividends thereon. At least thirty (30) days notice of such redemption shall be given by mail, at their respective addresses as shown on the books of the corporation, to the stockholders of record on the books of this corporation whose stock is redeemed, and such notice shall also be given by publication in a newspaper of general circulation published in the City of Los Angeles,

and in a newspaper of general circulation published in the City of San Francisco, State of California, once a week for at least thirty (30) days prior to the date fixed for such redemption. Such redemption shall be by such method as shall be provided from time to time by resolution of the Board of Directors of the corporation, and at such time and place as shall be specified in the notice. From and after the date fixed in any such notice as the date of redemption, unless default shall be made by this corporation in providing moneys at the time and place as aforesaid for the payment of the redemption price of said stock, all dividends on such stock so called for redemption shall cease to accrue, and from and after said date all the rights of the holders thereof as stockholders of this corporation, except the right to receive such redemption price, shall cease and determine. All numbers of the certificates of said preferred stock so redeemed shall be appropriately cancelled on the books of this corporation and the stock evidenced thereby shall not be reissued.

“The whole or any part of the preferred stock may be purchased by the corporation at any time by purchase upon the open market at not to exceed the par value thereof plus said fixed redemption premium thereon, plus unpaid, accrued, and accumulated dividends thereon; provided, however, that in no case shall the corporation purchase stock in the open market, or use its funds or property for the purchase of said stock, when such use would cause

an impairment of the capital of [89] the corporation. Such stock, when so purchased, shall be cancelled as redeemed stock, and when so cancelled shall not be reissued.

“On the dates herein fixed for the redemption of said 6½% Cumulative Preferred Serial Stock and on the dates, if any, fixed in any resolution of the board of directors of this corporation for the redemption of any other of the preferred stock of this corporation, such stock then outstanding shall be redeemed at par, plus unpaid, accrued, and accumulated dividends, together with any premium thereon as provided or authorized by this certificate of incorporation.

“Such redemption shall be made at the office of the corporation in the City of Los Angeles, State of California, and from and after said date, unless default shall be made by the corporation in providing moneys at said time and place for the payment of the redemption price of said stock, all dividends on said preferred stock so redeemed shall cease and determine, and from and after said date all of the rights of the holders thereof as stockholders of the corporation, except the right to receive such redemption price, shall cease and determine. All numbers of the certificates of said preferred stock so redeemed shall be appropriately cancelled on the books of this corporation and the stock evidenced thereby shall not be reissued.

“In the event that the corporation shall fail to redeem said preferred stock at the time and place

herein and/or in said resolution herein authorized, the holders of said preferred stock shall have the right to enforce payment of the par value of said preferred stock so agreed to be redeemed, together with the amount of any unpaid, accrued, or accumulated dividends thereon, together with the premium, if any, to be paid on such redemption, the same as on any unconditional claim or debt against the corporation, and upon payment thereof the rights of the holders thereof as stockholders of this corporation shall cease and determine and said preferred stock so paid shall be appropriately cancelled upon the books of this corporation and said stock shall not be reissued.

“In making redemption of any preferred stock issued pursuant to resolution of the board of directors as herein authorized, the terms and provisions of any such resolution or resolutions shall likewise be complied with.

“So long as said dividends on said preferred stock shall be paid as herein provided, the holders of the preferred stock shall have no voting power on any question, except as provided by statute, or by this certificate, but on the contrary, the sole and exclusive voting power shall be vested in the holders of the common stock, but should any dividend on any preferred [90] stock be not paid when payable as herein provided, and remain unpaid for ninety (90) days thereafter, then and so long as such dividend, or any part thereof, remains unpaid, the

issued and outstanding preferred stock shall be exclusively entitled to the voting power, except as otherwise provided by statute, but upon such dividend, or unpaid part thereof, being paid, the voting power of the preferred stock shall cease and the voting power reinvest in the common stock, and so on from time to time as said dividend, or part thereof, may remain unpaid, or may be paid as aforesaid.

“No stockholder of this corporation shall have any preemptive or preferential right of subscription to any shares of any stock of this corporation, or to any obligations convertible into stock of this corporation, issued or sold, nor any right of subscription to any thereof other than such, if any, as the board of directors of this corporation in its discretion from time to time may determine, and at such price as the board of directors from time to time may fix, pursuant to the authority hereby conferred by the certificate of incorporation of this corporation, and the board of directors may issue stock of this corporation, or obligations convertible into stock, without offering such issue of stock, either in whole or in part, to the stockholders of this corporation. The acceptance of stock in this corporation shall be a waiver of any such preemptive or preferential right which in the absence of this provision might otherwise be asserted by stockholders of this corporation, or any of them.

“No shares of said preferred stock shall enjoy any preference over any other shares of said preferred stock, except to the extent herein set forth and authorized.

“The preferred stock shall be issued as, and shall be, fully paid up and non-assessable.

“The shares of common stock, without nominal or par value, may be issued by the corporation from time to time for such consideration as may be fixed from time to time by the board of directors.” [91]

INCORPORATED UNDER THE LAWS OF THE STATE OF DELAWARE, MAY 31, 1923

NUMBER
1992

SERIES

3 1/2 % CUMULATIVE PREFERRED SERIAL STOCK

SERIES

REDEEMABLE JULY 1,

PACIFIC SOUTHWEST REALTY COMPANY

PAR VALUE \$ 100.00

Authorized Capital Stock: (a) 50,000 shares Common Stock, without nominal or par value; (b) \$5,000,000—3 1/2 % Cumulative Preferred Serial Stock, 50,000 shares, \$100.00 par, fixed dividend rate, 3 1/2 %, fixed redemption premium, 5% (\$100.00 per share), Series A to W, inclusive, maturing 1923-1931, inclusive; (c) \$1,000,000 Cumulative Preferred Serial Stock, \$100.00 par, dividend rate not to exceed 3 1/2 %, redemption premium not to exceed 5%, as determined by Board of Directors. On April 30, 1928, the Board of Directors determined upon the issuance of 1,000,000 (10,000 shares), fixed dividend rate, 3 1/2 %, fixed redemption premium, 5% (\$100.00 per share), designations and maturities as follows:

Series No.	Shares	Redeemable	Series No.	Shares	Redeemable	Series No.	Shares	Redeemable	Series No.	Shares	Redeemable	Series No.	Shares	Redeemable
AA	100	July 1, 1929	ES	100	July 1, 1943	II	200	July 1, 1947	MM	250	July 1, 1951	QQ	250	July 1, 1955
BB	100	July 1, 1940	FF	150	July 1, 1944	JJ	250	July 1, 1948	NN	250	July 1, 1952	RR	250	July 1, 1956
CC	100	July 1, 1941	OO	200	July 1, 1945	KK	250	July 1, 1949	OO	250	July 1, 1953	SS	250	July 1, 1957
DD	100	July 1, 1943	HH	200	July 1, 1946	LL	250	July 1, 1950	PP	250	July 1, 1954	UU	250	July 1, 1958
												VV	250	July 1, 1960

This Certifies that

is the owner of

fully paid 3 1/2 % Cumulative Preferred Serial Stock of Pacific Southwest Realty Company, a Corporation of the par value of One Hundred Dollars (\$100.00) each, transferred to you, the holder of this Certificate, by the holder thereof, in person or by attorney, upon surrender of this certificate properly endorsed. A statement of this reference and no other having optional or other special rights of the stock of the Corporation is printed on the back hereof and this certificate and the shares represented hereby are issued and shall be held subject to all of the provisions of the Certificate of Incorporation, as amended, a copy of which is on file in the office of the Registrar, all of which the holder by acceptance hereof assents.

This Certificate is not valid until countersigned by

*In Witness Whereof said Corporation has
its officers, and its Corporate Seal hereunto, of
date of*

19

Secretary

Shares of the

*the Transfer agent and registered by the Registrar.
raised this certificate to be signed by its duly authorized
agent, at Los Angeles, California, this*

President

100

The whole or any part of the preferred stock may be purchased by the Corporation at any time by purchase upon the open market or not to exceed the par value thereof plus said fixed redemption premium thereon, plus unpaid, accrued, and accumulated dividends thereon; provided, however, that in no case shall the Corporation purchase stock in the open market, or use its funds or property for the Corporation purchase of said stock, when such use would constitute a withdrawal of the capital of the Corporation. Such stock, when so purchased, shall be cancelled or removed from the books, and no cancelled stock will ever be reissued.

No shares of said preferred stock shall enjoy any preference over any other shares of said preferred stock, except to the extent herein set forth and authorized.

NOTICE: The signature of this assignment must correspond with the name as written upon the face of this Certificate in every particular without alteration or enlargement or any change whatever

EXHIBIT "I"

Additional Issue

\$1,000,000

Pacific Southwest Realty Company

5½% Cumulative Preferred Serial Stock

Par Value \$100 Per Share

Preferred as to assets and dividends, and in the event of liquidation entitled to receive \$102 per share. Dividends at the rate of 5½% per annum are cumulative and payable quarterly on the first day of October, January, April and July of each year. Callable, in whole or in part, on any dividend date upon 30 days' notice, at \$102 per share, plus accrued dividends. Stock may be transferred at the Company's office, Pacific-Southwest Bank Building, 215 West 6th Street, Los Angeles.

In opinion of Counsel, exempt from normal Federal Income Tax and exempt from Personal Property Tax in California

Los Angeles-First National Trust & Savings Bank,
Los Angeles, Registrar

This stock is issued in Series, designated "AA" to "VV" inclusive, maturing July 1, 1939 to July 1, 1960, respectively.

Mr. Henry M. Robinson, President of the Company, summarizes as follows the essential features of the issue:

History

The Pacific Southwest Realty Company was organized in 1923 to acquire from the Pacific-Southwest Trust & Savings Bank and The First National Bank of Los Angeles properties chiefly occupied by these institutions as bank premises in Los Angeles and other communities in which the banks were represented. All of the common stock of the Pacific Southwest Realty Company was acquired by the First Securities Company, and is still owned by that company. The First Securities Company is in turn wholly owned by the stockholders of the Los Angeles-First National Trust & Savings Bank, which is a consolidation of the above banks.

To finance the acquisition of these properties from the banks, the Pacific Southwest Realty Company had, prior to April 1, 1928, sold for cash to institutions and investors an aggregate of \$5,000,000 First Mortgage 5½% Bonds, and \$4,500,000 6½% Cumulative Preferred Serial Stock. As of April 1, 1928, a total of \$985,000 bonds had been retired. The first maturity of the preferred stock occurs July 1, 1929.

Authorized Capital Stock

During 1928 the authorized capital was increased by \$2,500,000, and now is as follows:

(a) 50,000 shares Common Stock, without nominal or par value.

(b) \$5,000,000 6½% Cumulative Preferred Serial Stock, 50,000 shares, \$100 par, fixed dividend rate 6½% per annum, fixed redemption premium of 5% (\$105.00 per share), Series "A" to "W", inclusive, maturing 1929-1951, respectively.

(c) \$2,500,000 Preferred Stock, 25,000 shares, \$100 par. The present offering of \$1,000,000, bearing fixed cumulative dividend rate of 5½% per annum and fixed redemption premium of 2% (\$102.00 per share), is a part of this authorized issue.

Outstanding Securities

With the completion of the present stock sale, the Pacific Southwest Realty Company will have outstanding \$4,500,000 6½% Cumulative Preferred Serial Stock, and \$1,000,000 5½% Cumulative Preferred Serial Stock, in addition to 50,000 shares Common Stock of no par value, owned by the First Securities Company.

With the completion of the present financing on or about July 2, 1928, there will be outstanding \$5,100,000 of first mortgage bonds. The aggregate total par value of outstanding preferred stock and bonds will then be \$10,600,000.

Properties

The principal buildings owned by the Realty Company are located at Sixth and Spring Streets, Los Angeles; Colorado Street and Marengo Avenue, Pasadena; and at Mariposa and Fulton Streets, Fresno. Each of these three properties is valued

at more than one million dollars. The Realty Company has heretofore owned 45 locations, of which 11 are within the corporate limits of Los Angeles, and the balance in communities where the Los Angeles-First National Trust & Savings Bank has been represented, from Fresno to El Centro.

We recommend this stock for investment and offer this issue, subject to prior sale and to allotment, at
\$98.00 Per Share, Plus Accrued Dividend from
July 1, 1928

First Securities Company

Owned by the Stockholders of the

Los Angeles-First National Trust & Savings Bank

Orders may be placed at any Branch of this Bank

Pacific-Southwest Bank Bldg.

Los Angeles

Telephone Vandike-2361

Pasadena Hollywood Glendale Long Beach

Santa Barbara Redlands Fresno San Francisco

June, 1928 [93]

The purpose of the present additional sale of stock and bonds is to acquire premises used wholly or in part for banking purposes at Santa Barbara, Dinuba, Altadena, San Fernando, Long Beach, Santa Monica, Culver City, Moneta, Belvedere Gardens, the following locations in Los Angeles—

Country Club Drive & La Brea Avenue, Jefferson & Arlington Streets, Carthay Center, Sixth & Alvarado Streets, and to pay for new buildings which have been erected in Hollywood and Pasadena on property heretofore owned by the Realty Company.

The aggregate cost of the Company's properties including those heretofore owned with those now being purchased, and including the new buildings which have been erected, will be in excess of \$11,-200,000.

Plan of Operation

It has never been intended to operate the Pacific Southwest Realty Company at a profit. At many points the Realty Company owns buildings adequate to accommodate tenants other than the Bank. Under such circumstances, an effort is made to rent as much of the available space as is not needed by the Bank to outside tenants at current prices. For the protection of the bondholders and preferred stockholders of the Pacific Southwest Realty Company, leases expiring in 1960 have been entered into between the Los Angeles-First National Trust & Savings Bank and the Realty Company whereby the Bank agrees to supplement the income collected by the Realty Company from outside tenants by an amount which when added to the sum collected from the rentals paid by others than the Bank will be sufficient to meet the operating expenses of the Realty Company, the interest on its bonds, the dividends on its preferred stock, and, in addition,

amortize over a period of years the total amount of bonds and preferred stock outstanding.

Protection of Stockholders

Every effort has been made to make the Preferred Stock as sound an investment security as possible, and having established its safety at the outset to provide that the stockholders' equity will never be impaired. To this end the Articles of Incorporation provide that the issuance of securities is to be based on the appraisalment of the properties made as of the date the Realty Company acquires such properties. Such appraisalment will be made by an appraiser selected by the Superintendent of Banks or by the Commissioner of Corporations of California or by their successors.

The clauses which protect the stockholders' equity are as follows:

(a) The amount of Preferred Stock to be issued shall not exceed 100% of the appraised value of the property purchased or to be purchased with the proceeds of the sale of such Preferred Stock.

(b) The aggregate indebtedness of the Company secured by mortgage, deed of trust or otherwise, shall not exceed in amount 50% of the appraised value of the property subject thereto.

(c) The total amount, however, of Preferred Stock at any time outstanding under (a), together with the total outstanding bonded indebtedness of the Company that may be issued under paragraph (b), shall not combined exceed 100% of the appraised value of the properties as established above.

The annual maturities of bonds and stocks will serve to increase the original equity as the different series mature and are retired.

If the Company sells or exchanges any of its property, it will within a reasonable time substitute for such property so sold or exchanged property of substantially equal value or retire with the proceeds of such sale Preferred Stock and/or Bonds.

Additional Preferred Stock can only be issued for cash for the purpose of acquiring with the proceeds of the sale thereof property suitable for the essential purposes of the Company, and further provided that the above provisions as to appraisal and the ratios of outstanding stock and bonds are maintained.

Special Provisions

1. No shares of Preferred Stock shall enjoy any preference over any other shares of Preferred Stock.

2. Preferred Stock shall be issued as fully paid up and non-assessable.

3. No additional Preferred Stock can be authorized nor the preferences altered without the consent of two-thirds of the holders of the outstanding Preferred Stock.

4. The Common Stock of the Company may receive dividends only when all Preferred Stock dividends have been paid, all matured stock redeemed and in addition only after an amount equal to the amount of two full yearly divi-

dends on the then outstanding Preferred Stock shall have been set aside or deposited and maintained with the Los Angeles-First National Trust & Savings Bank.

5. Should the dividends on the Preferred Stock remain unpaid for a period of ninety days after the date when such dividends are payable, the outstanding Preferred Stock enjoys exclusive voting power until any arrears in payment are extinguished.

6. In the event of failure to redeem any series of Preferred Stock on the maturity date, the holders thereof have the right to enforce the payment, as in the case of any unconditional claim or debt against the Company.

Tax Exemption

The Cumulative Preferred Serial Stock is, in opinion of counsel, free from the Personal Property Tax in California and likewise free from the Normal Federal Income Tax.

Ownership and Management

The entire issue of Common Stock, which enjoys the sole voting power, is owned by the First Securities Company, which is owned entirely by the stockholders of Los Angeles-First National Trust & Savings Bank. The management of the Pacific Southwest Realty Company is under the direction of Mr. Henry M. Robinson, President, and other officers and directors chosen from the officers and directors of the said bank.

Legality

All legal proceedings pertaining to the issuance of this stock have been approved by Messrs. Farrand and Slosson, Attorneys, Los Angeles. [94]

EXHIBIT "J"

(Form of Bond)

\$..... \$.....

United States of America

State of Delaware

(Vignette)

Pacific Southwest Realty Company

First Mortgage 5½% Bond, Series "A"

No.

Pacific Southwest Realty Company, a corporation organized and existing under and by virtue of the laws of the State of Delaware, and having its principal place of business in Delaware in the City of Dover, and in California in the City of Los Angeles (hereinafter called the "Company"), for value received, hereby promises to pay to the bearer, or, if registered, to the registered holder of this bond on the first day of July, 19....., Dollars, (\$.....) in gold coin of the United States of America, of or equal to the present standard of weight and fineness, together with interest thereon from the date hereof, at the rate of five and one-half per cent (5½%) per annum. payable semi-

annually in like gold coin, on the first days of January and July in each year, upon presentation and surrender of the interest coupons hereto attached as they severally mature. The principal hereof and the interest thereon are hereby made payable at Title Insurance and Trust Company, in the City of Los Angeles, State of California.

Both principal and interest shall be paid without deduction for any tax or taxes, assessments, or other governmental charges which the Company or the Trustee may be required or permitted to pay thereon or to retain therefrom under any present or future law of the United States, or of any state, county, municipality, or other governmental subdivision therein, not exceeding, however, in the case of Federal or other income taxes an aggregate of two per centum (2%) of the interest on the principal hereof.

This bond is one of an issue of thirty-six (36) First Mortgage 5½% Bonds, Series "A" of Pacific Southwest Realty Company, the total amount thereof being Three Million Dollars (\$3,000,000.00), all of like date and tenor, except the variations necessary to express their numbers, denominations, and maturities, the whole thereof, and the interest thereon being secured by a mortgage or deed of trust dated July 1, 1923, wherein Pacific Southwest Realty Company is grantor and trustor, and Title Insurance and Trust Company is grantee and trustee, assigning and conveying certain real and per-

sonal property described in said mortgage or deed of trust. For a description of the properties mortgaged, the nature and extent of the security, the rights of the holders of the bonds, and the terms and conditions upon which said [95] bonds are issued and secured, reference is made to said mortgage or deed of trust, to all of the provisions of which the holder hereof, by accepting this bond, assents.

The Company may, at its option, redeem and pay all or any part of said bonds upon any interest payment date, by the payment of the principal thereof and the interest due thereon, together with a premium of two per cent (2%) upon the principal thereof, such payment and redemption of said bonds to be accomplished in the manner set forth in said deed of trust.

In case an event of default, as defined in said mortgage or deed of trust, shall occur, the principal of all of said bonds including this, secured thereby then outstanding may become or be declared due and payable, in the manner, and with the effect provided for in said mortgage or deed of trust.

This bond shall pass by delivery unless registered in the name of the holder on the books of the Trustee, such registry to be in the manner and under the conditions specified in said mortgage or deed of trust. The registration of this bond shall not affect the negotiability of the coupons which shall continue to be payable to bearer and transferable by delivery.

No recourse shall be had for the payment of the principal of or interest upon this bond, or any part thereof, or for any claim based thereon, or otherwise in respect thereof, or on or in respect of said mortgage or deed of trust, against any incorporator, stockholder, officer, director, or trustee, past, present, or future, of the Company, whether by virtue of any constitution, statute, or rule of law, or by enforcement of any assessment or penalty or otherwise, all such liability being, by the acceptance hereof and as part of the consideration of the issue hereof, expressly released.

This bond shall not be valid or become obligatory for any purpose unless authenticated by the signature of Title Insurance and Trust Company, to the Trustee's certificate endorsed hereon.

In Witness Whereof, Pacific Southwest Realty Company has caused this bond to be signed in its corporate name by its President or a Vice-President and its corporate seal to be hereunto affixed, and duly attested by its Secretary or Assistant Secretary, and the coupons for said interest, with the engraved or lithographed fac-simile signature of its Secretary, to be attached hereto as of the first day of July, 1923.

PACIFIC SOUTHWEST REALTY
COMPANY,

By

Its President.

Attest:

.....

Secretary. [96]

(Form of Interest Coupon)

Coupon No. \$.....

On the first day of, 19....., unless the bond hereinafter mentioned shall have been called for previous redemption, Pacific Southwest Realty Company will pay to the bearer of this coupon at the office of Title Insurance and Trust Company, in the City of Los Angeles, State of California, Dollars (\$.....) in gold coin of the United States of America, being six months' interest then due on its First Mortgage 5½% Bond, Series "A" No.....

.....
Secretary. [97]

EXHIBIT "K"

Resolved, that the regular quarterly dividend of \$1.37½ a share on the 5½% Cumulative Preferred Serial Stock of this Corporation, amounting to \$13750, be and the same is hereby declared out of the earned surplus of the Corporation, payable July 1, 1937, to stockholders of record June 22, 1937, and that the stock transfer books of the corporation be closed from June 22, 1937, to said dividend payment date; and that the amount thereof be set aside and transferred to "dividend Declared" account.

[Endorsed]: U. S. B. T. A. Filed at hearing Feb. 20, 1941. [98]

[Title of Board and Cause.]

DESIGNATION OF CONTENTS OF
RECORD OF APPEAL

To the Clerk of the United States Board of Tax Appeals:

You are hereby requested to prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit copies, duly certified as correct, of the following documents and records in the above entitled cause in connection with the Petition for Review by the United States Circuit Court of Appeals for the Ninth Circuit heretofore filed by the above named petitioner:

1. Docket entries.

2. Pleadings.

(a) Petition including the notice of deficiency, and statement and claim and statement attached thereto.

(b) Answer of respondent.

3. Findings of Fact and Opinion of United States Board of Tax Appeals.

4. Decision of United States Board of Tax Appeals. [145]

5. Petition for Review.

6. Notice of Filing Petition for Review.

7. The Statement of Evidence with Exhibits called for therein, including Joint Exhibits A-1 and B-2. Said Statement of Evidence includes as Exhibit 1 thereto the Stipulation of Facts and Exhibits A

to K, inclusive, attached to the Stipulation of Facts.

8. This designation.

CLAUDE I. PARKER,

JOHN B. MILLIKEN,

BAYLEY KOHLMEIER,

808 Bank of America Building

Los Angeles, California.

Attorneys for Petitioner.

Of Counsel:

L. A. LUCE,

937 Munsey Building,

Washington, D. C.

Service of copy of this Designation of Contents of Record on Appeal is hereby admitted this 21st day of January, 1942.

Agreed to.

J. P. WENCHEL,

Attorney for Respondent.

[Endorsed]: U. S. B. T. A. Filed Jan. 21, 1942.

[146]

[Title of Board and Cause.]

CERTIFICATE

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 146, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by

the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 27th day of January, 1942.

(Seal)

B. D. GAMBLE,

Clerk,

United States Board of Tax
Appeals.

[Endorsed]: No. 10037. United States Circuit Court of Appeals for the Ninth Circuit. Pacific Southwest Realty Company, a corporation, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of the United States Board of Tax Appeals.

Filed February 2, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit

In the United States Circuit Court of Appeals
for the Ninth Circuit

Docket No. 10037

(B. T. A. Docket No. 102605)

PACIFIC SOUTHWEST REALTY COMPANY,
Petitioner,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STATEMENT OF POINTS TO BE RELIED
UPON ON APPEAL AND DESIGNATION
OF PORTION OF RECORD TO BE
PRINTED.

Comes now the petitioner above named, by its attorneys of record, and complying with the rules of this Court states that it intends to rely on appeal on all and each of the errors assigned in the Petition for Review herein, which Petition for Review is included in the transcript herein, and petitioner hereby formally adopts the errors assigned in said Petition for Review as its Statement of Points to be Relied upon on Appeal.

Petitioner further states that it relies upon the entire record, certified by the Clerk of the United States Board of Tax Appeals to this Court and

directs that said record, so certified, be printed as the record on appeal.

CLAUDE I. PARKER,
JOHN B. MILLIKEN,
BAYLEY KOHLMEIER,
808 Bank of America Bldg.,
Los Angeles, California
Counsel for Petitioner.

[Title of Circuit Court of Appeals and Cause.]

AFFIDAVIT OF SERVICE BY MAIL

State of California

County of Los Angeles—ss.

Ruth Alquist, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and it not a party to the within above entitled action; that affiant's business address is 808 Bank of America Building, Los Angeles, California; that on the 4th day of February, 1942 affiant served the within Statement of Points To Be Relied Upon on Appeal and Designation of Portion of Record To Be Printed on the Respondent in said action by placing a true copy thereof in an envelope addressed to Hon. Guy T. Helvering, Commissioner of Internal Revenue, Washington, D. C., and by placing a true copy thereof in an envelope addressed to J. P. Wenchel,

Chief Counsel of the Bureau of Internal Revenue, Attorney for Respondent, Washington, D. C., and by then sealing said envelopes and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California, where is located the office of the attorneys for the petitioner by and for which said service was made.

That there is delivery service by United States mail at the place so addressed or there is a regular communication by mail between the place of mailing and the place so addressed.

RUTH ALQUIST.

Subscribed and sworn to before me this 4th day of February, 1942.

(Seal) M. LeSAGE,

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Feb. 5, 1942. Paul P. O'Brien, Clerk.

No. 10037.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

PACIFIC SOUTHWEST REALTY COMPANY, a corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONER'S OPENING BRIEF.

CLAUDE I. PARKER,
JOHN B. MILLIKEN,
BAYLEY KOHLMEIER,

808 Bank of America Building, Los Angeles,
Counsel for Petitioner.

Of Counsel:

L. A. LUCE,
937 Munsey Building,
Washington, D. C.

FILED

MAY 29 1917

PAUL P. O'BRIEN,
CLERK

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No. 10037.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

PACIFIC SOUTHWEST REALTY COMPANY, a corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONER'S OPENING BRIEF.

Jurisdictional Statement.

This is an appeal from a decision of the United States Board of Tax Appeals in which deficiencies in income taxes were determined against petitioner for the years 1936 and 1937. The opinion below [R. 37] is reported at 45 B. T. A. 426.

Petitioner is a Delaware corporation and has its principal office in Los Angeles, California. Petitioner's income tax returns for the years 1936 and 1937 were filed with the Collector of Internal Revenue for the Sixth District of California. [R. 4, 36, 137.] Respondent determined deficiencies in petitioner's income taxes for the years 1936 and 1937 in the amounts of \$842.75 and \$13,878.81,

respectively, and on February 21, 1940, pursuant to Section 272 of the Internal Revenue Code, respondent sent to petitioner a notice of said deficiencies. [R. 4, 16.] On March 6, 1940, petitioner filed with the Collector of Internal Revenue for the Sixth District of California its written claim for refund of income taxes overpaid by it for the year 1936 in the amount of \$53,900.53. [R. 13, 22, 144.] On May 13, 1940, pursuant to Section 272 of the Internal Revenue Code, petitioner filed its appeal from the aforesaid proposed deficiencies and prayed for a determination that there was no deficiency for either year and for a further determination that petitioner overpaid its income taxes for the year 1936 in the amount of \$53,900.53. [R. 3.] After the hearing, at which a stipulation of facts and oral and documentary evidence were submitted, the Board of Tax Appeals entered its decision in favor of respondent on October 27, 1941. [R. 65.] On December 26, 1941, under authority of Section 1141 of the Internal Revenue Code (28 U. S. C., Section 1141) petitioner filed its Petition for Review by this Court of said decision of the Board of Tax Appeals. [R. 66.] This appeal and the transcript of record herein were filed and docketed in this Court on February 2, 1942. [R. 208.]

Statement of the Case.

The facts in this appeal are not in dispute and they present three principal legal issues, which may be stated as follows:

ISSUES.

I. Whether petitioner was indebted to the holders of its securities designated $6\frac{1}{2}\%$ Cumulative Preferred Serial Stock and $5\frac{1}{2}\%$ Cumulative Preferred Serial Stock and whether the so-called dividends paid to the holders thereof were in fact interest payments on indebtedness.

II. Whether petitioner was entitled to deductions for 1936 and 1937 for a portion of the discount at which its securities designated $5\frac{1}{2}\%$ Cumulative Preferred Serial Stock were issued and sold.

III. Whether petitioner was entitled to deductions in 1936 and 1937 for the amounts paid as premiums upon the retirement of its securities designated $6\frac{1}{2}\%$ Cumulative Preferred Serial Stock and $5\frac{1}{2}\%$ Cumulative Preferred Serial Stock.

The pertinent facts may be summarized as follows:

ISSUE I.

1. Petitioner is a corporation organized under the laws of the State of Delaware and has its principal place of business in the City of Los Angeles, California. [R. 137.]

2. Petitioner was incorporated by persons affiliated with the Pacific Southwest Trust and Savings Bank and First National Bank of Los Angeles for the purpose of acquiring and thereafter owning and operating all the real

estate properties owned by the Pacific Southwest Trust and Savings Bank and one parcel of real estate owned by the First National Bank of Los Angeles, and for the further purpose of providing additional bank premises as the growth of the banks required. [R. 137.] The reason for the organization of petitioner was that the growth of the banks required additional investment in bank premises and in order not to lock up the funds of the bank in real estate used for bank premises it was deemed advisable to organize a subsidiary company to own the real estate and to employ outside capital for that purpose. [R. 137, 159.]

3. All of the common stock of petitioner was issued to First Securities Company, an affiliate of the above banks. [R. 138.]

4. During the years 1923, 1924 and 1925 petitioner issued and sold its securities designated 6½% Cumulative Preferred Serial Stock. [R. 138.] During the year 1928 petitioner issued and sold its securities designated 5½% Cumulative Preferred Serial Stock. [R. 140.] Said securities were issued in accordance with and pursuant to the authority granted by article fourth of petitioner's certificate of incorporation. [R. 138, 140.] A true copy of article fourth of the certificate of incorporation is attached to the stipulation of facts as Exhibit "A" [R. 146] and a true copy of said article fourth of the certificate of incorporation as amended in 1927 is attached to the stipulation of facts as Exhibit "G." [R. 179.] Each of said securities was issued in series. The first series (series A) of the 6½% Cumulative Preferred Serial Stock matured and became payable on July 1, 1929, and the remaining series were to mature and become payable successively on the first day of July of each year there-

after to and including the year 1951. [R. 138.] The first series of the 5½% Cumulative Preferred Serial Stock (series AA) was to mature and become payable on July 1, 1939, and the remaining series were to mature and become payable successively on July first of each year thereafter to and including the year 1960. [R. 140.] The maturity dates of each series of said securities were set forth in the certificate of incorporation and the maturity date of each security was stated on the face of the certificate issued. [R. 157, 191.]

5. Said securities provided for the payment to the holders thereof of so-called dividends in the amount of 6½% per annum and 5½% per annum, respectively. The so-called dividends to be paid to the holders of said securities were limited to the specified percentages. It was provided in the certificate of incorporation and on the face of the certificates issued that upon the maturity date specified each series of said securities "shall be redeemed at par plus unpaid, accrued and accumulated dividends thereon." [R. 153, 187.] It was further provided: "In the event that the corporation shall fail to redeem" any series at the time and place specified "the holders thereof shall have the right to enforce payment of the par value of said stock so agreed to be redeemed, together with the amount of any unpaid, accrued or accumulated dividends thereon, the same as any unconditional claim or debt against the corporation." [R. 153, 187.] It was further provided: "In the event of any liquidation, dissolution or winding up of the corporation, whether voluntary or involuntary," the holders of said securities "shall be entitled, before any distribution shall be made to the holders of the common stock, to be paid out of the surplus profits arising from the business of this corpora-

tion, and then remaining intact, or in case such profits shall be insufficient, then from the general assets of this corporation, an amount equal to the par value thereof plus said fixed redemption premium, plus all unpaid, accrued, or accumulated dividends thereon.” [R. 151, 185.]

6. At the time said securities were issued petitioner had a lease agreement with Pacific Southwest Trust and Savings Bank whereby said bank was obligated to pay as rental a sum which, with the other income of petitioner, would be sufficient to pay all of petitioner’s operating expenses and the so-called dividends on petitioner’s cumulative preferred serial stock, and interest on petitioner’s mortgage bonds and the sums necessary to redeem said securities and bonds at maturity. [R. 140, 176.]

7. The holders of said securities had no voting rights or rights to participate in the management of the corporation except in case of default in payment of the so-called dividends and the continuance of such default for a period of ninety days, in which event the holders of said securities had exclusive voting rights until said default was cured. [R. 154, 188.]

8. Petitioner’s said securities were dealt in, in “over-the-counter” transactions and accrued dividends, prior to actual declaration thereof, were generally taken into consideration in substantially the same manner and to the same extent as accrued interest upon bonds is taken into consideration upon purchase or sale. [R. 39.]

9. During the year 1936 petitioner made payments of so-called dividends to the holders of its 6½% Cumulative Preferred Serial Stock and 5½% Cumulative Preferred Serial Stock in the amounts of \$65,300.63 and \$55,000.00, respectively. [R. 140, 141.] During the year 1937 peti-

tioner made payments of so-called dividends to the holders of its 5½% Cumulative Preferred Serial Stock in the amount of \$41,250.00. [R. 141.]

10. In its income tax return for the year 1937 petitioner took deductions for the aforesaid payments made on its said securities as interest paid on indebtedness. [R. 144.] In its income tax return for the year 1936 petitioner did not take deductions for said payments, but claimed the right to said deductions in a claim for refund later filed with the Commissioner of Internal Revenue. [R. 22.] Respondent denied petitioner's right to said deductions on the ground that petitioner's said securities were preferred stock. [R. 21.]

ISSUE II.

Additional Facts Pertaining to Issue II.

11. Petitioner's securities designated 5½% Cumulative Preferred Serial Stock were issued and sold at discounts. It is stipulated that

"If the discount at which said securities were sold was a deductible expense it was an expense which it was proper to amortize and deduct over the life of said securities and \$1,833.26 of said discount expense was properly allocable to the year 1936 and \$31,275.39 of said discount expense was properly allocable to the year 1937." [R. 141.]

12. In its income tax return for the year 1937 petitioner took a deduction for \$31,275.39 of said discount expense. [R. 144.] In its income tax return for the year 1936 petitioner did not take a deduction for any portion of said discount expense, but claimed the right to a deduc-

tion therefor in the amount of \$1,833.26 in a claim for refund duly filed. [R. 22.] Respondent refused to allow said deduction on the ground that petitioner's securities were preferred stocks. [R. 21.]

ISSUE III.

Additional Facts Pertaining to Issue III.

13. During the year 1936 petitioner redeemed and retired all of its then outstanding securities designated 6½% Cumulative Preferred Serial Stock for the face value thereof plus a total premium of \$182,025.00. [R. 142.]

14. During the year 1937 petitioner redeemed and retired all of its then outstanding securities designated 5½% Cumulative Preferred Serial Stock for the face value thereof plus a total premium of \$20,000.00. [R. 142.]

15. In its income tax return for the year 1937 petitioner took a deduction for the \$20,000.00 premium paid during the year 1937. [R. 144.] In its income tax return for the year 1936 petitioner did not take a deduction for the premium paid during said year, but claimed the right to the deduction of said premium in the amount of \$182,025.00 in a claim for refund duly filed. [R. 22.] Respondent refused to allow said deductions on the ground that petitioner's securities were preferred stocks. [R. 21.]

Facts in Regard to Payment of Tax and Claim for Refund.

16. Petitioner filed its income tax return for the year 1936 on March 15, 1937, and paid the tax shown thereon in the amount of \$83,251.08 in installments as follows:

\$20,812.77 on March 15, 1937, and like amounts on June 12th, September 13th and December 13, 1937. [R. 143.] On March 6, 1940, petitioner duly filed its claim for refund of income taxes overpaid by it for the year 1936 in the amount of \$53,900.53. [R. 144.] On May 22, 1940, petitioner paid to the Collector of Internal Revenue for the Sixth District of California the deficiencies in income taxes proposed for the years 1936 and 1937 and herein contested. Said payments were as follows: \$842.75 tax, \$161.09 interest, or a total payment of \$1,003.84 for the year 1936, and \$13,878.81 tax, \$1,820.21 interest, or a total payment of \$15,699.02 for the year 1937. [R. 145.]

Decision of Board of Tax Appeals.

17. The Board of Tax Appeals determined that petitioner's securities designated 6½% Cumulative Preferred Serial Stock and 5½% Cumulative Preferred Serial Stock were preferred stocks and held that respondent committed no error in denying the claimed deductions for interest, discount and premiums. [R. 59-60.] The Board further held that petitioner was not entitled to a deduction for certain taxes paid in 1936. [R. 64.] The conclusion of the Board with regard to the deduction of said taxes was assigned as error, but will not be urged in this appeal. The Board made and entered its decision in favor of respondent [R. 65] and petitioner brings this appeal from said decision. [R. 66.]

Summary of Argument.

I. Petitioner contends that since, under the terms and conditions of its securities designated $6\frac{1}{2}\%$ Cumulative Preferred Serial Stock and $5\frac{1}{2}\%$ Cumulative Preferred Serial Stock petitioner was required to repay the face value of said securities and to pay the so-called dividends at the rate fixed on or before the maturity dates which were stated on the face of the security certificates, and since petitioner's said obligation was enforceable against petitioner the same as any unconditional claim or debt, petitioner was indebted to the holders of securities and the so-called dividends were in fact interest on indebtedness and were deductible under Section 23(b) of the Revenue Act of 1936.

II and III. That since said securities represented indebtedness of petitioner to the holders thereof, the discount at which they were sold and the premium at which they were redeemed were deductible expenses.

Specification of Errors.

The errors relied upon by petitioner (separately stated below) all result from the erroneous determination of the Board of Tax Appeals that petitioner was not indebted to the holders of its securities designated $6\frac{1}{2}\%$ Cumulative Preferred Serial Stock and $5\frac{1}{2}\%$ Cumulative Preferred Serial Stock and that therefore:

- (a) The so-called dividends paid during the years 1936 and 1937 were not interest paid on indebtedness;

- (b) The discount at which the 5½% Cumulative Preferred Serial Stock sold was not deductible;
- (c) The premiums paid upon redemption of said securities were not deductible.

The United States Board of Tax Appeals erred—

1. In determining a deficiency in petitioner's income tax for the year 1936 in the amount of \$842.75.
2. In failing to determine that petitioner overpaid its income taxes for the year 1936 in the amount of \$53,900.53.
3. In determining a deficiency in petitioner's income tax for the year 1937 in the amount of \$13,878.81.
4. In determining that the securities issued by petitioner and designated as 6½% Cumulative Preferred Serial Stock were preferred stock.
5. In failing and refusing to determine that the securities issued by petitioner and designated as 6½% Cumulative Preferred Serial Stock evidenced indebtedness of the petitioner to the holders of said securities.
6. In determining that the securities issued by petitioner and designated as 5½% Cumulative Preferred Serial Stock were preferred stock.
7. In failing and refusing to determine that the securities issued by petitioner and designated as 5½% Cumulative Preferred Serial Stock evidenced indebtedness of the petitioner to the holders of said securities.
8. In failing and refusing to determine that the sum of \$65,300.63 paid by the petitioner during the year 1936

to the holders of its securities designated 6½% Cumulative Preferred Serial Stock was interest paid on indebtedness within the meaning of Section 23(b) of the Revenue Act of 1936.

9. In determining that the sum of \$65,300.63 paid by petitioner during the year 1936 to the holders of its securities designated 6½% Cumulative Preferred Serial Stock was not deductible as interest paid on indebtedness.

10. In failing and refusing to determine that the sum of \$55,000.00 paid by the petitioner during the year 1936 to the holders of its securities designated 5½% Cumulative Preferred Serial Stock was interest paid on indebtedness within the meaning of Section 23(b) of the Revenue Act of 1936.

11. In determining that the sum of \$55,000.00 paid by petitioner during the year 1936 to the holders of its securities designated 5½% Cumulative Preferred Serial Stock was not deductible as interest paid on indebtedness.

12. In failing and refusing to determine that the sum of \$41,250.00 paid by the petitioner during the year 1937 to the holders of its securities designated 5½% Cumulative Preferred Serial Stock was interest paid on indebtedness within the meaning of Section 23(b) of the Revenue Act of 1936.

13. In determining that the sum of \$41,250.00 paid by petitioner during the year 1937 to the holders of its securities designated 5½% Cumulative Preferred Serial Stock was not deductible as interest paid on indebtedness.

14. In failing and refusing to determine that petitioner was entitled to a deduction for the year 1936 for the portion of the discount at which its securities designated $5\frac{1}{2}\%$ Cumulative Preferred Serial Stock were sold which was allocable to 1936.

15. In failing and refusing to determine that petitioner was entitled to a deduction for the year 1937 for the portion of the discount at which its securities designated $5\frac{1}{2}\%$ Cumulative Preferred Serial Stock were sold which was allocable to 1937.

16. In failing and refusing to determine that petitioner was entitled to a deduction for the year 1936 in the amount of \$182,025.00 for the premium paid by petitioner during the year 1936 on the redemption of its securities designated $6\frac{1}{2}\%$ Cumulative Preferred Serial Stock.

17. In failing and refusing to determine that petitioner was entitled to a deduction for the year 1937 in the amount of \$20,000.00 for the premium paid by petitioner during the year 1937 on the redemption of its securities designated $5\frac{1}{2}\%$ Cumulative Preferred Serial Stock.

est regardless of the name of the security and regardless of the name used to describe the payments.

Commissioner v. Palmer, Stacy-Merrill, Inc. (C. C. A. 9, 1940), 111 Fed. (2d) 809;

Commissioner v. Proctor Shop, Inc. (C. C. A. 9, 1936), 82 Fed. (2d) 792;

Commissioner v. O. P. P. Holding Co. (C. C. A. 2, 1935), 76 Fed. (2d) 11;

Helvering v. Richmond F. & P. R. Co., *supra*;

Bolinger-Franklin Lumber Co. v. Commissioner, *supra*;

Diamond Calk Horse Shoe Co. v. United States (D. C. Minn., July 19, 1940. Opinion reported 1940 Prentice-Hall Federal Tax Service, para. 62919, and 1940 C. C. H. Federal Tax Service, para. 9641) (Appeal dismissed—C. C. A. 8, 116 Fed. (2d) 284);

Commissioner v. J. N. Bray Co., *supra*.

3. If under the terms and conditions of the security or other contract between the parties the corporation has no enforceable obligation to repay the principal sum or to pay the specified return on or before a definite date, the security is not a debt and the payments are not interest.

Elko Lamoille Power Co. v. Commissioner (C. C. A. 9, 1931), 50 Fed. (2d) 595;

United States v. South Georgia Railway Co. (C. C. A. 5, 1939), 107 Fed. (2d) 3;

Commissioner v. Schmoll Fils Association, Inc. (C. C. A. 2, 1940), 110 Fed. (2d) 611;

Brown-Rogers-Dixon Co. v. Commissioner (C. C. A. 4, 1941), 122 Fed. (2d) 347.

The above principles have been accepted by respondent and incorporated in the Regulations which interpret the excess profits tax law. Regulations 109, Section 30.719-1 sets forth the following principles for determining what constitutes "borrowed capital":

"Whether outstanding certificates designated by such names as 'debenture preferred stock' or 'guaranteed preferred stock' constitute borrowed capital depends upon whether the holder has a proprietary interest in the corporation or has the rights of a creditor, determined in the light of all the facts. The name borne by the certificate is of little importance. More important attributes to be considered are whether or not there is a maturity date, the source of payment of any 'interest' or 'dividend' specified in the certificate (whether only out of earnings or out of capital and earnings), rights to enforce payment, and other rights as compared with those of general creditors."

C. THE TERMS AND CONDITIONS OF PETITIONER'S SECURITIES ESTABLISH THAT PETITIONER WAS INDEBTED TO THE HOLDERS THEREOF.

1. *Petitioner Incurred an Enforceable Obligation to Repay the Principal and Accumulated Dividends on or Before the Maturity Date Specified.*

The securities of petitioner here in question were authorized by Article Fourth of petitioner's Certificate of Incorporation [R. 146-155, 179-190] which specifically provided the terms of the securities, the conditions under which they could be issued and the duties of petitioner to the holders of said securities. The terms and conditions were also printed on the certificates. [R. 157, 191-192.] As the two securities here in question were identical in

all respects material hereto, they will be considered together in this brief.

As indicated by the name, the securities were issued in series with the number of shares in each series and the maturity date of each series stated on the face of the certificate. It was specifically provided that each series "shall be redeemed" on the maturity date specified at par, plus unpaid, accrued and accumulated dividends. [R. 153.] It was further provided "In the event that the corporation shall fail to redeem" any series at the time and place specified "the holders thereof shall have the right to enforce payment of the par value of said stock so agreed to be redeemed, together with the amount of any unpaid, accrued, or accumulated dividends thereon, the same as on any unconditional claim or debt against the corporation". [R. 153.]

In the event of liquidation or dissolution of petitioner, whether voluntary or involuntary, the holders of the 6½% Cumulative Preferred Serial Stock and the 5½% Cumulative Preferred Serial Stock were to receive the par value of the securities, plus the premium and accumulated dividends out of surplus profits, or if the "profits shall be insufficient, then from the general assets of this corporation". [R. 151.]

The rate of the payments to the holders of said securities was likewise definitely fixed at 6½% and 5½% respectively of the par value of the certificates and they were not entitled to receive any greater sums regardless of the profits of the corporation. [R. 150.]

It is clear from the above terms and conditions, which were set forth in the Certificate of Incorporation of petitioner and on the security certificates, that petitioner was definitely obligated to repay to the holders of the securities

in question the principal sum or face value thereof, plus the specified premium and the specified annual return or so-called dividend. The obligation was enforceable by the holders of the securities against petitioner, the same as any unconditional claim or debt, and could be collected from the general assets of petitioner. While the so-called dividends were to be paid currently from the profits of petitioner, all payments which were not made prior to the maturity date of the security accumulated and upon the maturity of the security all such accumulated and unpaid sums were enforceable against the corporation, the same as any unconditional claim or debt against the corporation, and could be collected from the general assets of the corporation. Under the terms and conditions of the security the sums paid therefor were clearly loaned to petitioner for the definite period of time stated on the face of the certificate at the fixed rate of return also stated on the face of the certificate and at the termination of the term specified the repayment of the principal sums, plus any portion of the fixed return not theretofore paid, was enforceable against the general assets of the corporation. Such conditions definitely make the obligation represented by petitioner's said securities indebtedness and the payments thereon interest within the meaning of Section 23(b) of the Revenue Act of 1936.

The only thing in petitioner's Certificate of Incorporation or in the certificates which were issued to represent said securities which is inconsistent with indebtedness is the names and language used. The securities were called stock and the payments to be made to the holders were called dividends. But the use of such terms and names certainly did not relieve petitioner from the obligations specifically and definitely imposed upon it to repay the

principal sums and to pay the annual amounts specified at the times and in the amounts set forth in its Certificate of Incorporation and on the face of the security certificates. Petitioner's obligations and liabilities were much too clearly and definitely stated to have been nullified or avoided by the mere use of names which are ordinarily given to securities which do not carry such obligations and liabilities.

Furthermore, this Court and others have consistently and without exception held that the name given to the security and to the payments on the security are not determinative of the character of the obligation. The courts have consistently gone behind the names used and determined the true character of a security from its basic terms and conditions.

In *Commissioner v. Proctor Shop, Inc.* (C. C. A. 9, 1936), 82 Fed. (2d) 792, and *Commissioner v. Palmer, Stacy-Merrill, Inc.* (C. C. A. 9, 1940), 111 Fed. (2d) 809, this Court held that securities designated "debenture preference stock" and "preferred stock" represented indebtedness and not a stock as the names indicated, and that the payments made to the holders thereof were interest. In each of the above cases the determining factor was that, as in the case at bar, the corporation was definitely obligated to repay the principal sum and the specified dividends on or before a fixed date regardless of earnings. In *Commissioner v. Proctor Shop, Inc.*, *supra*, this Court distinguished its prior decision in *Elko Lamoille Power Co. v. Commissioner*, 50 Fed. (2d) 595, on the ground that in that case, "There was * * * no obligation to redeem".

In *United States v. South Georgia Railway Co.* (C. C. A. 5, 1939), 107 Fed. (2d) 3, in holding the security under consideration to be a stock, the Court stated:

“There is, thus, an entire absence here of the most significant, if not the essential feature of a debtor and creditor as opposed to a stockholder relationship, the existence of a fixed maturity for the principal sum with the right to force payment of the sum as a debt in the event of default.”

The United States District Court, Minnesota, in *Diamond Calk Horse Shoe Company v. United States* (July 19, 1940), (Reported in 1940 Prentice-Hall Federal Tax Service, paragraph 62,919, and 1940 C. C. H. Federal Tax Service, paragraph 9641, Appeal dismissed C. C. A. 8, 116 Fed. (2d) 284) reached the same conclusion in regard to a security designated “preferred stock”. The Court stated:

“The certificate, although designated as preferred stock, has every characteristic of an indebtedness. The corporation, the obligor, is unconditionally bound to pay, regardless of earnings or surplus, to the obligee, the holder of the certificate, a definitely ascertainable sum, to wit, the amount of the investment plus seven per cent at the maturity fixed, which is on or before five years from the date of the issuance of the certificate. Regardless of any name given to the certificate or to the holder thereof, if we disregard the form and consider the substance, we have a debtor-creditor obligation and relationship, and not that of a corporation and stockholder.”

The same test was applied in a similar case by the Circuit Court of Appeals for the Second Circuit in *Commissioner v. O. P. P. Holding Co.* (1935), 76 Fed. (2d)

11. See also *Arthur R. Jones Syndicate v. Commissioner* (C. C. A. 7, 1927), 23 Fed. (2d) 833; *Helvering v. Richmond F. & P. R. Co.* (C. C. A. 4, 1937), 90 Fed. (2d) 971; *Commissioner v. J. N. Bray Co.* (C. C. A. 5, Mar. 13, 1942), Fed. (2d)

Where the liabilities and obligations necessary to establish indebtedness were not present, the courts have held payments called "interest" to be in fact not interest but dividends.

Commissioner v. Schmoll Fils Association, Inc.
(C. C. A. 2, 1940), 110 Fed. (2d) 611;

Brown-Rogers-Dixon Co. v. Commissioner (C. C. A. 4, 1941), 122 Fed. (2d) 347;

Ticker Pub. Co. v. Commissioner, 46 B. T. A.
No. 50.

The rule of the above cases has been accepted and uniformly applied by the courts in the determination of cases of this type. See *Jewel Tea Co. v. United States* (C. C. A. 2, 1937), 90 Fed. (2d) 451; *United States v. South Georgia Railway Co.* (C. C. A. 5, 1939), 107 Fed. (2d) 3.

Petitioner submits that under the rule of the above cases the definite obligation of petitioner to repay the principal sum of its securities and to pay the return specified on or before the maturity date, which obligation was enforceable against the general assets of petitioner, establishes that petitioner's obligation to the holders of said securities was a debt and that the payments made to the holders thereof were interest paid on indebtedness.

2. *The Secondary Terms and Conditions of Petitioner's Securities Are Consistent With and Indicate Indebtedness.*

The other terms and conditions of petitioner's securities were such as might be found either in a security evidencing indebtedness or a stock and for that reason most of them deserve no special comment. The securities contained no terms or conditions inconsistent with a debt except the names used.

It should be noted, however, that the holders of the securities in question were entitled to receive only the specified return on the par value of the securities and had no right under any circumstances to participate in additional profits of the company. Also they had no right to vote or otherwise participate in the management of the company as long as the securities were not in default. If there was a default in payments which continued for ninety days, thereafter and until the default was cured the holders of the securities in question had exclusive voting rights. When the default was cured the voting rights reverted in the common stock. Under the law of Delaware voting rights could be granted to bondholders.

Delaware General Corporation Law, Sec. 29.

Petitioner was required to use the proceeds received from the sale of its cumulative preferred serial stock for the acquisition of property suitable for the purposes of the corporation. It was further provided that the par value of petitioner's outstanding cumulative preferred serial stock, together with the total bonded indebtedness, should not exceed 100% of the appraised value of the property of the corporation. If petitioner sold any of its properties it was required to apply the proceeds in the

acquisition of other property of substantially equal value or to the retirement of its cumulative preferred serial stock or bonded indebtedness. [R. 148-150.]

At the time petitioner's securities designated cumulative preferred serial stock were sold there was in effect a lease agreement whereby petitioner leased properties to Pacific Southwest Trust and Savings Bank and in which said bank agreed to pay an annual rental which, together with other income of petitioner, would be sufficient "to pay all operating costs of Lessor (petitioner), maintenance, upkeep, repairs, taxes (including special assessments), and insurance on the properties owned by it, *and in addition all interest, dividend, and amortization charges on its outstanding bonds and preferred stock issued or to be issued by it.*" (Italics supplied.) [R. 176.] By said lease agreement the bank in effect guaranteed the payment of the so-called dividends on petitioner's cumulative preferred serial stock and guaranteed the retirement thereof on the maturity dates specified. The above provision in the lease was called to the attention of the prospective purchasers of said securities and it was pointed out that the payment of the so-called dividends and the retirement of the securities was assured by the rental contract. [R. 160, 169.]

3. *Intent of the Parties.*

The established rule of law is that the intent of the parties to a contract is to be determined from the terms of the contract.

California Civil Code, Sec. 1639.

It is clear from the terms and conditions of the securities in question and from the statements issued in regard

thereto that the intention of petitioner in issuing these securities was to secure the use of money for a definitely determined period for a definitely determined charge. Petitioner clearly bound itself to repay the principal sums on the dates specified and bound itself to pay $6\frac{1}{2}\%$ and $5\frac{1}{2}\%$ per annum of the par value of the securities on or before the specified maturity dates. Petitioner's obligation was not dependent upon earnings or profits but was enforceable against the general assets of petitioner, the same as any unconditional claim or debt against the corporation. The obligation which was created and which the parties clearly intended to create was an obligation which the law calls a debt.

Notwithstanding the express and intentional provisions of the securities petitioner named the securities preferred stocks and named the payments thereon dividends. There is nothing in the record, however, which in any way indicates that in using said names the parties intended to limit or alter the obligations expressly imposed upon petitioner under the express terms of the security. Likewise, the use of said names in no way affected petitioner's express obligations. It has been the use of these names which has caused the confusion and controversy in this case. If petitioner had named the securities debentures and had named the payments thereon interest, there could be no doubt that petitioner was indebted to the holders of the security and that the payments thereon were actually interest.

The parties may have thought that the securities which they had created were a special type of stock with unusual provisions. The use of the word "serial" in the name, however, indicates that the securities were not considered to be ordinary preferred stock. It is also clear

from the statements made in the prospectus that it was clearly understood that the investment was for a limited time and that on or before the maturity date specified the principal sum was to be repaid, with accumulated fixed dividends, from the general assets of petitioner if necessary. There is nothing to indicate that particular significance attached to the names used. The terms of the securities were so clearly and definitely stated that the rights between the parties could not have been affected by whatever name was used. If, by reason of the express terms of the contract, it should be classified as a debt, the fact that the parties called it a stock is of no importance. Other parties have named their securities debts and named the payments thereon interest but the courts have nevertheless looked to the terms of the securities and determined that they were stocks and the payments were dividends.

Commissioner v. Schmoll Fils Association, Inc.
(C. C. A. 2, 1940), 110 Fed. (2d) 611;

United States v. South Georgia Railway Co. (C.
C. A. 5, 1939), 107 Fed. (2d) 3;

Ticker Publishing Co. v. Commissioner, 46 B. T.
A. No. 50.

Petitioner submits that the names given to the securities and the payments thereon did not change the obligations of petitioner and that the true character of a security should be determined from the terms of the contract and not by the names used by the parties. The terms of the securities in question classify them as debts and not as stocks.

D. ANALYSIS OF DECISION BELOW.

The basis of the conclusion of the Board of Tax Appeals that petitioner was not indebted to the holders of its securities called cumulative preferred serial stock is not entirely clear but from the statements in the opinion it appears that the Board's decision was based primarily upon the following facts and conclusions:

1. There is no evidence that the holders of the securities were unwilling to become stockholders.

2. The Board's conclusion that if the securities represented indebtedness petitioner violated its Certificate of Incorporation.

3. The securities were referred to as preferred stock and the payments thereon were referred to as dividends.

There is no evidence herein that the holders of petitioner's securities would not have purchased preferred stock but such condition has never been considered a prerequisite to indebtedness. Such evidence has been considered in some cases in determining that a security which did not appear from its terms to be indebtedness was actually indebtedness because the parties so intended.

Commissioner v. Proctor Shop, Inc. (C. C. A. 9, 1936), 82 Fed. (2d) 792;

Commissioner v. Palmer, Stacy-Merrill, Inc. (C. C. A. 9, 1940), 111 Fed. (2d) 809;

Arthur R. Jones Syndicate v. Commissioner (C. C. A. 7, 1927), 23 Fed. (2d) 833.

Petitioner has never contended that there was any agreement or understanding between it and the holders of its securities other than the terms of the securities

themselves. It is submitted that where the security by its own terms and conditions is an indebtedness, whether or not the parties would have been willing to purchase some other type of security is entirely immaterial.

The Board places considerable emphasis upon its conclusion that if petitioner's securities are held to be indebtedness petitioner violated its Certificate of Incorporation. [R. 54, 59.] The Board bases its conclusion upon the provision in petitioner's Certificate that "The aggregate indebtedness of the corporation secured by mortgage, deed of trust or otherwise shall not exceed Fifty percent (50%) of the appraised value of the property subject thereto." [R. 148.] It is apparent from the above quotation that the restriction applied only to secured indebtedness. It has never been contended and there is nothing in the facts herein to indicate that the indebtedness of petitioner to the holders of its securities designated cumulative preferred serial stock was in any way secured. It is submitted that the conclusion of the Board is erroneous and in direct conflict with the facts in this case.

It is true that the securities in question were named preferred stock and the payments to be made to the holders thereof were named dividends. In its dealings with prospective purchasers and holders of said securities petitioner consistently referred to the securities as preferred stock. The payments on said securities were referred to as dividends and were handled by petitioner as dividends. Petitioner's manner of reference to the securities was merely consistent with the name which had been given to the security. As stated above in this brief, the names used did not and were not intended to change the terms of the contract and the true character of a security is to

be determined from the terms and conditions thereof and not from the names used. From the opinion below it appears that the decision of the Board was based almost entirely upon the fact that the securities were called preferred stocks, the payments were called dividends, and the other acts of petitioner which resulted from the use of said names.

The Board in its opinion gave no real consideration to the fact which this Court and the other courts and the Board in other cases have held to be the determining factor in similar cases, namely, the fact that petitioner had an enforceable obligation to redeem the securities and pay the accumulated so-called dividends on or before definitely specified dates and that the obligation was enforceable against the general assets of petitioner, the same as **any** unconditional claim or debt against the corporation. The Board disposed of this fact with the following comment:

“These provisions, petitioner contends, make the securities an ‘indebtedness.’ Respondent denies that they have any such effect, points out that the right to enforce the payment as an unconditional claim or debt appears to be limited to the holders of any series then in default, which, so far as this record shows, never occurred, and argues that ‘the interest of any person in the assets of a corporation must necessarily be either as a creditor or as a proprietor’, but can not be both at the same time.” [R. 57.]

If petitioner correctly understands the above quoted statement, it means that no obligation to pay on a future date is a debt until the payment date arrives and the payor defaults. If that statement is correct there are no debts except those in default for no creditor can enforce payment of a debt prior to the due date and if a debt is paid

on the due date there is no default. The same statement could be made about any bond or debt. It is respectfully submitted that the above statement is clearly erroneous. The fact that petitioner never defaulted, but paid its obligations in accordance with the terms of its securities, certainly does not justify a conclusion that the security was not a debt.

Petitioner agrees that a person cannot be both a stockholder and a creditor by reason of a single interest in a corporation but petitioner's contention is that the holders of its securities were not stockholders but were in fact creditors.

The Board also suggests that the redemption of petitioner's securities might not have been enforceable to the detriment of general creditors or bondholders. This Court has held that an obligation may be a debt even though it is specifically made subordinate to the claims of general creditors.

Commissioner v. Proctor Shop, Inc. (C. C. A. 9, 1936), 82 Fed. (2d) 792;

Commissioner v. O. P. P. Holding Co. (C. C. A. 2, 1935), 76 Fed. (2d) 11.

The Board cited *Brown-Rogers-Dixon Co. v. Commissioner* (C. C. A. 4, 1941), 122 Fed. (2d) 347, in support of its final conclusion. In that case the securities being considered had no maturity date and the Court stated:

"There was no due or maturity date fixed for the payment of the principal. It has been repeatedly held that one of the fundamental characteristics of a debt is a definite determinable date on which the principal falls due."

It is respectfully submitted that petitioner's securities designated 6½% Cumulative Preferred Serial Stock and 5½% Cumulative Preferred Serial Stock represented indebtedness of petitioner to the holders thereof and that the so-called dividends paid by petitioner to the holders of said securities were in fact interest on indebtedness within the meaning of Section 23(b) of the Revenue Act of 1936 and were deductible for income tax purposes. Petitioner further submits that the Board of Tax Appeals erred in holding that said securities were not debts and that the payments thereon were not interest.

ISSUE II.

Discount Expense.

It is stipulated herein that petitioner's securities designated 5½% Cumulative Preferred Serial Stock were issued and sold at a discount and that if said discount is deductible \$1,833.26 was allocable to 1936 and \$31,275.39 was allocable to 1937. [R. 141.] Respondent refused to allow the deduction of the discount expense on the ground that petitioner's securities were preferred stocks. Since it is well established that the discount at which bonds and other securities evidencing indebtedness are sold is deductible (*Regulations* 94, Art. 22(a) 18) the determination of whether petitioner is entitled to deductions for said discount expense depends upon the determination of whether petitioner's obligation to the holders of its said securities was a debt. Reference is made to the facts and arguments stated under Issue I. The decision of the Board of Tax Appeals that the discount expense was not deductible was based upon its conclusion that the securities were not debts. [R. 51.]

ISSUE III.

Premiums Paid.

It is stipulated that petitioner redeemed its securities designated 6½% Cumulative Preferred Serial Stock during the year 1936 for the face value of the securities plus a premium of \$182,025.00 and redeemed its 5½% Cumulative Preferred Serial Stock during the year 1937 for face value of the securities plus a premium of \$20,000.00. [R. 142.] Respondent refused to allow the deduction of said premiums on the ground that petitioner's securities were preferred stocks. Since it is well established that if a corporation purchases its bonds or other securities evidencing indebtedness at a premium the excess of the purchase price over the issuing price is a deductible expense (*Regulations 94*, Art. 22(a) 18) the determination of whether petitioner is entitled to deductions for the premiums paid depends upon the determination of whether the petitioner's securities represented indebtedness. Reference is made to the facts and arguments stated under Issue I. The decision of the Board of Tax Appeals that the premiums paid were not deductible was based upon its conclusion that the securities were not debts. [R. 51.]

CONCLUSION.

1. Since under the specific terms of its securities designated 6½% Cumulative Preferred Serial Stock and 5½% Cumulative Preferred Serial Stock petitioner was required to repay the par value of said securities plus all accumulated so-called dividends on or before the maturity dates specified and said obligation was enforceable against the general assets of petitioner, the same as any claim or debt against the corporation, said securities were not

stocks but in fact represented indebtedness of petitioner to the holders of the securities and:

- a—The so-called dividends paid to the holders of said securities were in fact interest payments on indebtedness and were deductible under Section 23(b) of the Revenue Act of 1936.
- b—The discount at which the 5½% Cumulative Preferred Serial Stock was issued was a deductible expense and the portions thereof properly allocable to the years 1936 and 1937 were deductible in those years.
- c—The premiums paid by petitioner upon the redemption of said securities were deductible expenses for the years in which paid.

2. The Board of Tax Appeals erred in refusing to allow the deduction of said interest paid, discount expense and premiums paid.

3. The decision of the Board of Tax Appeals should be reversed.

Respectfully submitted,

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March, 1942.

No. 10037

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

PACIFIC SOUTHWEST REALTY COMPANY, a CORPORATION,
PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**ON PETITION FOR REVIEW OF THE DECISION OF THE UNITED
STATES BOARD OF TAX APPEALS**

BRIEF FOR THE RESPONDENT

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FILED

APR 25 1942

PAUL F. O'BRIEN.

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OPINION BELOW

The opinion of the United States Board of Tax Appeals (R. 37-65) is reported in 45 B. T. A. 426.

JURISDICTION

This appeal involves income taxes for the years 1936 and 1937, and is taken from a decision of the Board of Tax Appeals entered October 27, 1941 (R. 65), sustaining deficiencies in the respective amounts of \$842.75 and \$13,878.81. With respect to the year 1936 the petitioner claimed that it had overpaid its income taxes in the amount of \$53,900.53. (R. 38.) The case is brought to this Court by a petition for

review filed December 26, 1941 (R. 66-75), pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

QUESTION PRESENTED

Whether the distributions here made to the holders of petitioner's "preferred serial stock" were dividends or interest on indebtedness within the meaning of Section 23 (b) of the Revenue Act of 1936. (The deductibility of sales discounts and purchase premiums will depend upon the answer to the above question, and no separate discussion thereof is deemed necessary.)

STATUTES AND REGULATIONS INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * *

(b) INTEREST.—All interest paid or accrued within the taxable year on indebtedness, * * *

* * * *

SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

(a) DEFINITION OF DIVIDEND.—The term "dividend" when used in this title * * * means any distribution made by a corporation to its shareholders, whether in money or in other property, (1) out of its earnings or profits accumulated after February 28, 1913, or (2) out of the earnings or profits of the taxable year. * * *

* * * *

Treasury Regulations 94, promulgated under the Revenue Act of 1936:

ART. 22 (a)-18. *Sale and purchase by corporation of its bonds.*—(1) (a) If bonds are issued by a corporation at their face value, the corporation realizes no gain or loss. (b) If the corporation purchases any of such bonds at a price in excess of the issuing price or face value, the excess of the purchase price over the issuing price or face value is a deductible expense for the taxable year. * * *

* * * *

ART. 23 (b)-1. *Interest.*—* * *

* * * *

So-called interest on preferred stock, which is in reality a dividend thereon, can not be deducted in computing net income. (See, however, article 22 (a)-18 and section 121.) In the case of banks and loan or trust companies, interest paid within the year on deposits such as interest paid on moneys received for investment and secured by interest-bearing certificates of indebtedness, issued by such bank or loan or trust company may be deducted from gross income.

* * * *

STATEMENT

Petitioner was incorporated in 1923 under the laws of Delaware by persons affiliated with the Pacific Southwest Trust & Savings Bank and the First National Bank of Los Angeles for the purpose of acquiring, and thereafter owning and operating, all of the real estate properties owned by the first mentioned bank and one parcel of real estate owned by the second

mentioned bank, and for the further purpose of providing additional bank premises as the growth of the banks required. The principal reason for organizing petitioner was to avoid "the locking up of too great a proportion" of the capital and surplus of the banks in real estate owned by them. (R. 39-40.)

The total authorized capital stock of the corporation was 100,000 shares, divided into 50,000 shares of preferred of the par value of \$100 each and 50,000 shares of common with no nominal or par value. The original articles of incorporation provided for the issuance of 23 series of 6½% cumulative preferred serial stock, to be designated by the letters A to W, both inclusive, each series to be for the number of shares shown (ranging between 1,100 and 3,950) and to be "redeemable at their par value plus all unpaid, accrued, or accumulated dividends thereon." Such cumulative preferred serial stock could be issued as and when the board of directors should determine, but it could not be issued except for the purpose of acquiring property suitable for one or more of the purposes of the corporation. The articles of incorporation also provided (R. 40):

* * * The aggregate indebtedness of the corporation secured by mortgage, deed of trust, or otherwise, shall not exceed in amount Fifty per cent (50%) of the appraised value of the property subject thereto. The total amount of preferred stock of the corporation at any time outstanding shall not, together with the total bonded indebtedness of the corporation, exceed One Hundred per cent (100%) of the appraised value of the property of the corporation * * *.

The 6½% cumulative preferred serial stock was “entitled to receive in each year out of the surplus or net profits of the business of the corporation, dividends at the rate of 6½% per annum, and no more, upon the par value of said stock from date of issue, payable quarterly * * *.” The dividends were cumulative and “if in any year or years the dividends * * * shall not have been paid, such dividends shall be paid in full before any dividends shall be paid or set apart upon the common stock. The amount of any serial redemption of said preferred stock, if overdue, shall be paid before any dividends shall be paid or set apart on the common stock.” (R. 41.)

In the event of liquidation, dissolution, or winding up of the corporation, the holders of the preferred stock were entitled, before any distribution could be made to the holders of the common stock, “to be paid out of the surplus profits * * *, or in case such profits shall be insufficient, then from the general assets of this corporation, an amount equal to 105% of the par value of said stock.” Upon the maturity date specified in each series the shares were to “be redeemed at par, plus unpaid, accrued, and accumulated dividends thereon * * *.” In the event the corporation should fail to redeem the stock at such time and place, the holders were to “have the right to enforce payment of the par value of said stock so agreed to be redeemed, together with the amount of any unpaid, accrued, or accumulated dividends thereon, the same as on any unconditional claim or debt against the corporation * * *.” The pre-

ferred stock was to have no voting power, the sole voting rights being vested in the holders of the common stock. In the event that any dividend on the preferred stock should not be paid when payable and should remain unpaid for 90 days, then so long as such dividend or any part thereof should remain unpaid, the issued and outstanding preferred stock was to be exclusively entitled to the voting power. (R. 41-42.)

Pursuant to the original articles of incorporation during the years 1923, 1924, and 1925, petitioner issued and sold 6½% cumulative preferred serial stock of the total par value of \$4,500,000 in 23 series designated A to W, inclusive. Series A matured and became payable on July 1, 1929, and one of the remaining series matured and became payable on July 1 of each year thereafter to and including the year 1951. The certificates were redeemable at par "plus all unpaid, accrued, or accumulated dividends thereon", and entitled the owners "to receive in each year out of the surplus or net profits of the business of the corporation, dividends at the rate of 6½% per annum, and no more, upon the par value of said stock from date of issue * * *." The certificates also contained the essence of article fourth of the original articles of incorporation, including the provisions quoted above. During the years 1924 and 1925 petitioner also issued and sold its 5½% coupon bonds of a total face value of \$3,000,000. The proceeds derived from the sale of the preferred stock and bonds were used for the purchase of real estate suitable for the purposes of the corporation. (R. 42-43.)

In connection with the issuance and sale of petitioner's 6½% cumulative preferred serial stock in 1923 a prospectus was published by the First Securities Company. Therein it was stated that petitioner proposed to issue at that time \$3,000,000 of 5½% first mortgage bonds and \$3,000,000 6½% cumulative preferred stock and to hold in its treasury the balance of the authorized preferred stock for issuance from time to time as the needs of the company should require. The prospectus also stated: "it is the intention of the Realty Company (petitioner) to finance its present needs by equal amounts of Preferred Stock and Bonds * * *. The annual maturities of bonds and stocks will serve to increase the original equity as the different series mature and are retired", and "The 6½% Cumulative Preferred Serial Stock is, in opinion of counsel, free from the Personal Property Tax in California and likewise free from the Normal Federal Income Tax." (R. 43-44.)

Series A of the 6½% cumulative preferred serial stock matured and was redeemed on July 1, 1929. Series B to G, inclusive, matured and were redeemed respectively on July 1 of each year thereafter to and including 1935. At the beginning of the year 1936 6½% cumulative preferred serial stock of a total par value of \$3,766,500 was issued, outstanding, and unmatured. During the year 1936 all of the securities were redeemed and retired. During the year 1936 petitioner made payments to holders of the 6½% cumulative preferred serial stock at the rate of 6½% per annum of the par value thereof, or \$65,300.63 as provided in the certificates. (R. 44.)

On December 16, 1927, petitioner's articles of incorporation were amended. A copy of article fourth as amended is attached to the stipulation of facts. There were no substantial changes made with respect to preferences, privileges, and other rights of the holders of preferred stock, but the amended article provided for a total authorized capital stock of 125,000 shares, divided into 75,000 shares of preferred stock of the par value of \$100 each and 50,000 shares of common stock having no nominal or par value. During the year 1928, pursuant to the authority contained in the article as amended, petitioner issued and sold its securities designated 5½% cumulative preferred serial stock of the total par value of \$1,000,000. The proceeds derived therefrom were used for the purchase of real estate suitable for the purposes of the corporation. The certificates were issued in 22 series designated AA to VV, inclusive, payable on July 1, 1939, and successively thereafter on July 1 of each year to and including the year 1960. Each certificate recited that on April 20, 1928, the board of directors "determined upon the issuance of \$1,000,000 (10,000 shares) fixed dividend rate, 5½%, fixed redemption premium, 2% (\$102.00 per share), designations and maturities as follows: (Schedule)." (R. 45.)

The prospectus issued in connection with the 5½% cumulative preferred serial stock stated (R. 46):

With the completion of the present stock sale, the Pacific Southwest Realty Company will have outstanding \$4,500,000 6½% Cumulative Preferred Serial Stock, and \$1,000,000 5½% Cumulative Preferred Serial Stock, in addition

to 50,000 shares Common Stock of no par value, owned by the First Securities Company.

With the completion of the present financing on or about July 2, 1928, there will be outstanding \$5,100,000 of first mortgage bonds. The aggregate total par value of outstanding preferred stocks and bonds will then be \$10,600,000.

The prospectus also stated that the stock being offered was, "in opinion of counsel, free from the Personal Property Tax in California and likewise free from the Normal Federal Income Tax."

During the year 1936 all of the 5½% cumulative preferred serial shares of the par value of \$1,000,000 were outstanding. All of them were redeemed and retired during the year 1937. During the years 1936 and 1937 petitioner made payments to the holders of the securities as provided in the certificates at the rate of 5½% of the par value thereof or \$55,000 during the year 1936 and \$41,250 during the year 1937. (R. 46.)

The payments made by petitioner to the holders of its 6½% cumulative preferred serial stock and 5½% cumulative preferred serial stock were authorized by resolutions of the board of directors of petitioner. A true copy of one of the resolutions is attached to the stipulation. It declares a "regular quarterly dividend of \$1.37½ a share on the 5½% Cumulative Preferred Serial Stock of this corporation, amounting to \$13,750 * * * out of the earned surplus of the corporation" and directs "that the amount thereof be set aside and transferred to 'Dividend Declared' account." (R. 46-47.)

The 5½% cumulative preferred serial stock had been sold by the petitioner at discounts of \$3 and \$5 per \$100 par value, the discount aggregating \$46,858. It is stipulated that if the discount at which the securities were sold was a deductible expense, it was an expense which it was proper to amortize and deduct over the life of the securities and \$1,833.26 of the discount expense was properly allocable to the year 1936 and \$31,275.39 was properly allocable to the year 1937. (R. 47.)

During the year 1936 petitioner redeemed and retired all of its then outstanding 6½% cumulative preferred serial stock for the face value thereof (\$3,766,500) plus a total premium of \$182,025. During the year 1937 it redeemed and retired all of its then outstanding 5½% cumulative preferred serial stock for the face value thereof (\$1,000,000) plus a total premium of \$20,000. (R. 47.)

In its income tax return for the year 1936 petitioner failed to take deductions for the payments made on its securities designated 6½% cumulative preferred serial stock and 5½% cumulative preferred serial stock, failed to take deduction for the portion of the discounts at which its securities designated 5½% cumulative preferred serial stock were issued and sold which was allocable to the year 1936, and failed to take a deduction for the premium paid upon the redemption of its securities designated 6½% cumulative preferred serial stock. In its income tax return for the year 1936 petitioner reported net taxable income in the amount of \$562,740.52 and a tax

liability in the amount of \$83,251.08. Petitioner paid this tax in installments as follows: \$20,812.77 on March 15, 1937, and like amounts on June 12, September 13, and December 13, 1937. Petitioner's return for the year 1936 was filed on March 15, 1937. (R. 48-49.)

Upon examination of petitioner's income tax return for the year 1936 the Commissioner disallowed the deduction taken by petitioner for real estate taxes in the amount of \$5,618.35 and determined the net income of petitioner for the year 1936 to be \$568,358.87. The deficiency for the year 1936 in the amount of \$842.75 resulted from the disallowance of the deduction and the consequent increase in petitioner's net income. This item is not involved in this appeal. (Pet. Br. 9.)

On March 6, 1940, petitioner filed with the Collector of Internal Revenue for the Sixth District of California, at Los Angeles, California, its written claim for refund of income taxes overpaid by it for the year 1936 in the amount of \$53,900.53, setting forth therein the same facts and grounds herein relied upon. (R. 49-50.)

In its income tax return for the year 1937 petitioner deducted as interest paid the payments made on its securities designated 5½% cumulative preferred serial stock in the amount of \$41,250, deducted the sum of \$31,275.39 as the portion of the discount at which the securities were issued and sold which was properly allocable to the year 1937, and deducted the premium paid in the amount of \$20,000 upon the redemption of the securities. The Commissioner refused to allow these deductions. (R. 50.)

On May 22, 1940, petitioner paid to the Collector of Internal Revenue for the Sixth District of California the deficiencies in income taxes proposed to be assessed against it for the years 1936 and 1937. The payments were as follows: \$842.75 tax and \$161.09 interest, or a total payment of \$1,003.84 for the year 1936, and \$13,878.81 tax and \$1,820.21 interest, or a total payment of \$15,699.02 for the year 1937. (R. 50.)

The Board of Tax Appeals sustained the deficiencies as determined by the Commissioner. (R. 65.)

SUMMARY OF ARGUMENT

The Board of Tax Appeals properly concluded that the distributions made to the holders of petitioner's "preferred serial stock" were dividends and not interest on indebtedness within the meaning of Section 23 (b) of the Revenue Act of 1936. In allowing a deduction for interest paid, Congress contemplated an indebtedness as normally regarded. The distributions here fall within the specific letter of the statutory definition of dividend. Accordingly, the petitioner assumed quite a burden in asking this Court to reverse the Board of Tax Appeals and hold that the distributions were not what they seem but were in reality interest payments.

In the instant case, the provisions of the charter, the prospectus, the certificates of stock, and the other documentary exhibits may be given their ordinary meaning, in classifying the distributions in question, since there is no showing here by evidence *aliunde* the documents of any special intention to enter into an arrangement other than that which the documents themselves would

normally indicate. All factors point to the conclusion that the relationship was that of a preferred stockholder, with the possible exception of the fact that there was a fixed redemption date, after which the holder had an unrestricted right to enforce the obligation. This Court has ruled that this fact does not of itself constitute the holder a creditor.

ARGUMENT

The Board of Tax Appeals properly concluded that the distributions made to the holders of petitioner's "preferred serial stock" were dividends and not interest on indebtedness within the meaning of Section 23 (b) of the Revenue Act of 1936

The question presented herein is very simple: Whether the distributions called "dividends" were in fact and substance dividends on preferred stock or interest on indebtedness. However, the answer is not as simple as the petitioner's counsel suggests. The decisions of the Court, on which the petitioner relies primarily, in *Commissioner v. Proctor Shop*, 82 F. (2d) 792, and *Commissioner v. Palmer, Stacy-Merrill, Inc.*, 111 F. (2d) 809, are based upon unique facts and are clearly distinguishable.

In the *Proctor Shop* case evidence *aliunde* the contract showed a very definite reason (to avoid the usury statute) for calling the instrument preferred stock instead of a bond. The Board there found that the recipient of the instrument was willing to lend money to the corporation (provided he could get a high return for his money), but he was not willing to invest in the business, and the Board concluded that

from this and other factors (including the fixed maturity date) the so-called "debenture preference stock" was in reality evidence of an indebtedness rather than a proprietary interest.

Likewise in the *Palmer, Stacy-Merrill, Inc.* case, *supra*, "evidence *aliunde* the contract" was relied upon to show the real substance of the transaction as one of indebtedness. It is to be noted that in both this and the *Proctor Shop* case, *supra*, the Board of Tax Appeals had made findings of fact which indicated the real nature of the transaction between the parties. General Fruit Company wished to buy the business of some of its competitors. The competitors wished to sell for cash, but the General Fruit Company did not have sufficient cash to consummate the deal. The competitors finally consented to accept so-called preferred stock, of a new corporation, on the purchase price provided a specified percentage be redeemed each year, which undertaking was required to be guaranteed by General Fruit Company. The real substance of such transaction was that the competitor companies were selling their business and were to be paid over a fixed period of years. In the face of such evidence, the fact that the transaction took the form of preferred stock was not controlling. In reality there was an indebtedness for the purchase price.

The facts in the above cases, on which this Court predicated its decisions, are not at all comparable with those of the instant case. All of the other cases cited by the petitioner are likewise distinguishable in some essential factual point. Many decisions have been ren-

dered on this question generally, falling to one side or the other, depending upon the particular facts of each case. Wholesale citations of such decisions would add little to this discussion as this Court is undoubtedly familiar with the general principles to be applied and is fully aware of the fundamental rule that each case must be decided on the basis of its own facts. Accordingly, we will limit our subsequent discussion of cases to those directly bearing on the primary factor on which this petitioner relies to show indebtedness, i. e., the fact that the preferred stock here had a fixed date for redemption.

At the outset, this Court should bear in mind that this is a deduction case and that in all such cases it is incumbent upon the taxpayer to bring himself squarely within the scope of the statute allowing the deduction. In allowing a deduction for interest paid, Congress contemplated an indebtedness as normally regarded. In this connection the following excerpt from the recent decision of the Supreme Court in *Deputy v. du Pont*, 308 U. S. 488, seems particularly pertinent (p. 497-498):

There remains respondent's contention that these payments are deductible under section 23 (b) as "interest paid or accrued * * * on indebtedness." Clearly respondent owed an obligation to the Delaware Company. But although an indebtedness is an obligation, an obligation is not necessarily an "indebtedness" within the meaning of section 23 (b). Nor are all carrying charges "interest." In *Old Colony R. C. v. Commissioner*, 284 U. S. 552, this Court

had before it the meaning of the word "interest" as used in the comparable provision of the 1921 Act (42 Stat. 227). It said, p. 560, "* * * as respects 'interest,' the usual import of the term is the amount which one has contracted to pay for the use of borrowed money." It there rejected the contention that it meant "effective interest" within the theory of accounting or that "Congress used the word having in mind any concept other than the usual, ordinary and everyday meaning of the term." p. 561. It refused to assume that the Congress used the term with reference to "some esoteric concept derived from subtle and theoretic analysis." p. 561.

We likewise refuse to make that assumption here. It is not enough, as urged by respondent, that "interest" or "indebtedness" in their original classical context may have permitted this broader meaning. We are dealing with the context of a revenue act and words which have today a well-known meaning. In the business world "interest on indebtedness" means compensation for the use or forbearance of money. In absence of clear evidence to the contrary, we assume that Congress has used these words in that sense. In sum, we cannot sacrifice the "plain, obvious and rational meaning" of the statute even for "the exigency of a hard case." See *Lynch v. Alworth-Stephens Co.*, 267 U. S. 364, 370.

Petitioners throughout have referred to these payments by respondent as being capital in nature. * * *

* * * * *

Thus it was not enough for the petitioner here to show that the holders of its "preferred serial stock"

enjoyed rights beyond those ordinarily given to stockholders. The fact that the issuing company assumed some additional definite obligation, which might well be enforceable as between the immediate parties, is not decisive of the present question. As pointed out in the *du Pont* case, *supra*, every obligation is not an "indebtedness" within the meaning of Section 23 (b), *supra*. It is incumbent upon the petitioner, in order to prevail here, to show that the holders were creditors in the full sense of the word.

If the distributions here are dividends, rather than interest on indebtedness, in the ordinary business sense, the deduction cannot be allowed. It should be noted that in Section 115 (a), *supra*, Congress defined the term "dividend" to mean any distribution made by a corporation to its stockholders out of its earnings or profits. It was specifically provided here that the "dividends" were to be paid (R. 150) "out of the surplus or net profits of the business". It seems obvious, therefore, that the distributions here fall within the specific letter of the statutory definition of dividend. Accordingly, the petitioner assumes quite a burden in asking this Court to reverse the Board of Tax Appeals and hold that the distributions were not what they seem but were in reality interest payments.

In the instant case, the provisions of the charter, the prospectus, the certificates of stock, and the other documentary exhibits may be given their ordinary meaning, in classifying the distributions in question, since there is no showing here, as there was in the *Proctor Shop* and *Palmer, Stacy-Merrill* cases, *supra*,

by evidence *aliunde* the documents of any special intention to enter into an arrangement other than that which the documents themselves would normally indicate. In so finding, the Board of Tax Appeals pointed out (R. 53) that the facts disclosed an intention by the company and a willingness by the stockholders to assume the stockholder, rather than the creditor, relationship.

A brief reference to such documents seems appropriate at this point. In the petitioner's Certificate of Incorporation it was provided that (R. 146) the authorized capital stock should be 100,000 shares, divided into 50,000 shares of preferred stock and 50,000 shares of common stock, and that (R. 147) such preferred stock should be designated "6½% Cumulative Preferred Serial Stock". The charter further provided (R. 148) that the indebtedness "secured by mortgage, deed of trust, or otherwise" shall not exceed 50% of the appraised value of the property, and that the total amount of preferred stock shall not, together with the bonded indebtedness, exceed 100% of the appraised value of the property. The charter further provided (R. 150) that the specified dividends on the preferred serial stock should be paid "out of the surplus or net profits of the business". It was also provided that specified series of the stock were redeemable at specified times (R. 147), and that, after the redemption date, the holders might proceed against the company to enforce the obligation to redeem (R. 153) "the same as on any unconditional claim or debt against the corporation".

It seems clear that a stockholder, rather than a creditor, relationship was contemplated throughout the transaction. Every factor points toward the status of preferred stockholder, with the exception of the last one referred to. Even if it were assumed here that the preferred stockholder became a creditor to that extent after maturity and default under the redemption obligation, his status during the life of the agreement in which the distributions in question were made would still be that of a preferred stockholder. In the field of corporate financing, legal advisors are generally very careful to differentiate between a stockholder and a creditor relationship, to the end that the credit of the corporation be maintained and the continuance of its business protected from creditors' suits in troublesome times. It is to be noted that (R. 166) all legal proceedings pertaining to the issuance of this stock were approved by the law firm of Farrand and Slosson, Los Angeles, and that (R. 163) in the opinion of counsel the "dividends" were exempt from normal federal income tax (which would not have been the case if they really constituted interest on indebtedness). Obviously, such counsel used the terms "preferred stock" and "bonds" in their ordinary business sense, and in no way contemplated at the time of issuance that the distributions termed "dividends" would be classified as interest on indebtedness. As pointed out by the Board (R. 55) it is not without significance that the petitioner treated the payments as dividends upon its books and in all of its tax returns up to and including 1936, the first of the two years here involved.

Other factors supporting the Board's conclusion are set forth in the lengthy statement of facts and need not here be repeated. As pointed out by the Board (R. 53) all factors point to the conclusion that the relationship was that of a preferred stockholder, with the possible exception of the fact that there was a fixed redemption date, after which the holder had an unrestricted right to enforce the obligation. As indicated earlier in the brief, the discussion of cases will be limited to those involving this factor.

In the case of *In re Culbertson's*, 54 F. (2d) 753, this Court faced a problem similar to that here involved. The claim there presented was that (p. 754):

* * * these certificates were in such form and issued in such manner that although denominated "certificates of preferred stock" they were in fact certificates of indebtedness entitling the holder thereof to participate as a creditor in the assets of the bankrupt corporation.

This Court there made these pertinent observations (p. 755):

* * * at the outset we find it difficult to believe that where an individual has purchased a number of shares of preferred stock in a corporation, the certificates issued to him for such preferred stock, designating the number of shares he purchased and the par value thereof, were nevertheless, by reason of the terms thereof, in fact certificates of indebtedness. On this appeal there are involved only three classes of certificates, designated as class "A," class "B," and class "D" certificates, respec-

tively. As already pointed out, these certificates, were in the usual form of stock certificates. Each and every of them stated the amount of the capital stock of the corporation, the number of shares into which divided and the number of shares covered by the certificate, provided for the payment of dividend at a specified per centum per annum, payable on specified semiannual dates, and contained a provision to the effect that until such dividend should be paid no dividends should be paid on the common stock. Each and every certificate herein involved contained a provision to the effect that the preferred stock has no voting power, and also a provision for the retirement of the stock covered by the certificate; the terms of this last-mentioned provision varying somewhat in the different classes, as later specified herein.¹

The following solution of the problem as presented by this Court in that case might well be adopted in solving the very similar problem here (p. 756, 757):

It is contended on behalf of appellants that this agreement to repay the value of the stock and dividends constitutes evidence of a loan to be repaid at the time and at the rate of interest therein designated. But it is not permissible to segregate one clause of the agreement and base a judicial decision thereon. It is apparent

¹ The Court said (p. 756): The provisions just referred to, as they are contained in the class A certificates, are as follows: "The said Company will on ----- 19-- pay to the holder of this certificate the par value thereof, together with such dividends as is hereinafter provided for. * * *"

that it was the intention of the parties that these certificates should evidence the right of the holders thereof to participate in the earnings of the corporation as holders of preferred stock entitled, by reason thereof, to receipt of the agreed proportion of the net earnings they were to receive before holders of common stock were entitled to share in such earnings. * * * there is nothing in the certificate in question which justifies the conclusion that it was intended to be other than what it purported on its face to be, namely, a certificate of preferred stock. * * *

* * * * *

If, as we have held, this agreement constituted the holder thereof a stockholder, the fact that it provides for the redemption of a certificate does not constitute the holder a creditor (14 C. J. 417), * * *

In the earlier case of *Armstrong v. Union Trust*, 248 Fed. 268, this Court was likewise presented with the question whether the holders of certain "preferred stock", which the issuing corporation agreed to redeem at the end of five years, were stockholders or creditors. The remarks there made are equally pertinent here (p. 270, 271):

The company appreciated very well the difference between certificates of indebtedness and preferred stock, as it, by its board of directors, provided for the creation of each kind of liability. Capital stock has a distinct characteristic, and represents the capital upon which the corporation is authorized to do business. It may be paid up, or merely subscribed. If the latter,

the subscriber is liable to the company for its par value, and it constitutes one of the assets of the company, to all of which creditors may look for payment of their demands. A certificate of indebtedness is therefore quite a different thing from a certificate of capital stock in a corporation. The one represents a liability of the company to the creditor; the other a liability to the stockholder, who has contributed of his means to the capital of the corporation, and has become in that respect a party to the venture. * * *

* * * * *

Looking back of this to the records of the corporation, we find that the capital stock was increased and fixed at \$1,000,000, of which 2,000 shares, or \$200,000, were to be preferred. The \$200,000 was therefore designed as, and was directly declared to be, a part of the capital stock of the corporation. So that a person, in negotiating for and acquiring this preferred stock, became a contributor to the capital stock of the company. He thus signified his desire and purpose to participate in the venture of carrying on the business for which the company was incorporated, and his willingness to share in the profits it might derive and the losses it might sustain in engaging in the enterprise. These certificate purchasers must be held to full knowledge and appreciation of the real character of their investments, and that they were to become participants in the enterprise, and not mere creditors of the corporation. To intimate otherwise would be to impugn their intelligence. * * *

From a review of the entire situation

we conclude that these certificate holders are stockholders—preferred stockholders, as the certificates indicate—and not creditors. * * *

In reaching the above decision, this Court cited approvingly *Ellsworth v. Lyons*, 181 Fed. 55 (C. C. A. 6th), and *Spencer v. Smith*, 201 Fed. 647 (C. C. A. 8th), which are frequently cited on this point. In the *Ellsworth* case, *supra*, though likewise involving a creditor proceeding and not a tax case, the problem presented was the same and the facts very clearly parallel those of the case at bar. There the “preferred stock”, which was issued in 1902, provided that it shall be retired June 1, 1912. The court there rejected the contention of the holder that he was not in reality a stockholder at all, but essentially a creditor.

In *Kentucky River Coal Corp. v. Lucas*, 51 F. (2d) 586, affirmed *per curiam*, 63 F. (2d) 1007 (C. C. A. 6th), the court applied these same principles to an income tax case. The taxpayer there insisted that the unconditional undertaking on the part of the corporation to redeem certain preferred stock at the expiration of ten years gave such shares the characteristics of a debt. In denying this claim, the court pointed to the fact that the stock was listed in the charter as part of the capital stock structure (as it was here) and the stipulated dividend was to be paid only out of surplus profits and earnings (as it was here). With respect to the obligation to redeem at a fixed date, the court observed that while the stockholders among themselves could make such an agreement, the courts would likely rule that the rights of such holders were

subordinate to the rights of general creditors. See also to the same effect *Finance & Investment Corp. v. Burnet*, 57 F. (2d) 444 (App. D. C.).

In *Jewel Tea Co. v. United States*, 90 F. (2d) 451 (C. C. A. 2d), the court indicated that some doubt had arisen in its mind on this question and suggested that the broad rule of its former decision in *Commissioner v. O. P. P. Holding Corp.*, 76 F. (2d) 11, should be limited. In the *Jewel Tea Co.* case that court said (p. 453):

Possibly *Commissioner v. O. P. P. Holding Corporation*, *supra*, 76 F. (2d) 11, does not commit us to the doctrine that shares must under all circumstances be debts when they contain a provision that the holder may unconditionally demand his money at a fixed time. Courts have differed as to that. At times they have gone to lengths to construe such a power as limited to a surplus. *Hazel Atlas Glass Co. v. Van Dyk & Reeves*, 8 F. (2d) 716 (C. C. A. 2). At times they have thought such an agreement unlawful under local law; or, even if lawful, not of itself enough to make the shareholder a creditor. *Fidelity Savings & Loan Association v. Burnet*, 62 App. D. C. 131, 65 F. (2d) 477; *In re Culbertson's*, 54 F. (2d) 753 (C. C. A. 9); *Kentucky River Coal Corporation v. Lucas* (D. C.) 51 F. (2d) 586; *Id.*, 63 F. (2d) 1007 (C. C. A. 6). All we now decide is that in the absence of such a provision the security cannot be a debt.

On the nature and general effect of rights based upon fixed redemption dates, particularly where the rights of general creditors are involved (which pre-

sents the real test of whether the holder is a creditor in the full sense or merely a preferred stockholder who has special rights), see the frequently cited case of *Koeppler v. Crocker Chair Co.*, 200 Wis. 476; *Bates v. Daley's, Inc.*, 5 Cal. App. (2d) 95; *Fletcher, Cyclopedia Corporations* (Perm. Ed.-1932), Vol. 11, pp. 722-738.

CONCLUSION

The decision of the Board of Tax Appeals is correct and should be affirmed.

Respectfully submitted.

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APRIL 1942.

No. 10037

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PACIFIC SOUTHWEST REALTY COMPANY, a corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONER'S REPLY BRIEF.

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MAY - 7 1942

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PETITIONER'S REPLY BRIEF.

Respondent's Distinction of Prior Decisions of This
Court Is Not Sound.

In petitioner's opening brief it was pointed out that by the specific terms and conditions of petitioner's securities designated Cumulative Preferred Serial Stock petitioner had a definite and legally enforceable obligation to repay to the holders of said securities on or before a specified date the principal sum of said securities and the fixed annual return regardless of earnings or profits of petitioner. The rights of the holders of said securities were limited to the return of the sums advanced plus the fixed annual return. This Court and other courts have consistently and repeatedly held that where a corporation has a definite obligation of that type to holders of its

securities the obligation is indebtedness and the payments made thereon are interest regardless of the fact that the securities might be named stock and the payments thereon might be named dividends.

Commissioner v. Palmer, Stacy-Merrill, Inc. (CCA 9, 1940), 111 F. (2d) 809;

Commissioner v. Proctor Shop, Inc. (CCA—9, 1936), 82 F. (2d) 792;

Commissioner v. O. P. P. Holding Co. (CCA—2, 1935), 76 F. (2d) 11;

Helvering v. Richmond F. & P. R. Co. (CCA—4, 1937), 90 F. (2d) 971;

Bolinger-Franklin Lumber Co. v. Commissioner, 7 B. T. A. 402;

Diamond Calk Horse Shoe Co. v. United States, (D. C. Minn., July 19, 1940. Opinion reported 1940 Prentice-Hall Federal Tax Service, para. 62919, and 1940 C. C. H. Federal Tax Service, para. 9641) (Appeal dismissed—C. C. A. 8, 116 F. (2d) 284);

Commissioner v. J. N. Bray Co. (CCA—5, Mar. 13, 1942), F. (2d)

The basis of the above decisions is that the true nature of a security, like any other contract, is to be determined from its terms and conditions and not from the names used and that a definite obligation to repay the principal sum with a fixed annual percentage return thereon which must be paid on or before a definite date is consistent only with a debt and not with a stock, preferred or otherwise.

In some cases the courts have received and considered evidence *aliunde* the contract which established that such an obligation existed between the corporation and the holders of its securities, even though the terms of the security itself did not so provide.

Arthur R. Jones Syndicate v. Commissioner, 23 F. (2d) 833;

Commissioner v. Proctor Shop, Inc. (CCA—9, 1936), 82 F. (2d) 792;

Commissioner v. Palmer, Stacy-Merrill, Inc. (CCA—9, 1940), 111 F. (2d) 809.

Respondent does not question the soundness of the cases cited nor show wherein the basic facts in the case at bar differ from the basic facts in the cited cases. Respondent refers only to *Commissioner v. Proctor Shop, Inc.*, *supra*, and *Commissioner v. Palmer, Stacy-Merrill, Inc.*, *supra*. Respondent asserts that those two cases are distinguishable from the case at bar because there was evidence, outside the contract, that the parties intended to create a debt or, in other words, intended that the corporation should have a definite obligation to repay the principal sum and designated return on or before a specified date, even though the contract between the parties did not expressly so provide. In the case at bar such obligation was expressly imposed upon petitioner by the contract itself. Additional evidence was not necessary to establish that petitioner was so obligated to the holders of its securities and that the obligation was enforceable against the general assets of petitioner.

It does not follow, from the fact that in the mentioned cases evidence *aliunde* the contract was received and con-

sidered in determining the true character of the contract, that such evidence is necessary in cases in which the obligation established by such evidence is expressly provided in the contract between the parties. Neither does it follow that the principle of those cases is inapplicable where the necessary obligation appears from the express terms of the contract without the aid of additional evidence.

In *Diamond Calk Horse Shoe Co. v. United States* (D. C. Minn. Reported in 1940 Prentice-Hall Federal Tax Service, para. 62919, and 1940 C. C. H. Federal Tax Service, para. 9641; Appeal dismissed—C. C. A. 8, 116 F. (2d) 284, the facts were almost identical with the facts in the case at bar. There the court stated:

“There is no need to seek facts *aliunde* the so-called stock certificate. The legal effect of the contract between the corporation and the holder of the certificate requires a finding that a debtor-creditor relationship exists, and dividends paid thereunder are, and were, interest payments within the meaning of the statute.”

Petitioner makes no contention that there was any understanding or agreement between it and the holders of its securities which was not fully expressed in the contract between them. On the contrary, petitioner bases its contentions entirely upon the terms and conditions expressly included in the certificates which evidenced the securities and in petitioner's Certificate of Incorporation.

Petitioner submits that the distinction which respondent attempts to draw between the case at bar and *Commissioner v. Proctor Shop, Inc.*, *supra*, and *Commissioner v. Palmer, Stacy-Merrill, Inc.*, *supra*, is not sound. Petitioner further submits that said decisions are squarely in point and support petitioner's contentions.

Deputy v. du Pont Is Not in Point.

Respondent cites *Deputy v. du Pont*, 308 U. S. 488, to the effect that every obligation is not indebtedness. In the cited case it was held that an obligation to return borrowed stock was not indebtedness and that sums paid as a carrying charge for the use of the stock were not interest on indebtedness. The facts and the decision in that case have no bearing upon the facts and issues in the case at bar. Petitioner does not suggest a departure from the usual definition of interest, namely "the amount which one has contracted to pay for the use of borrowed money". Petitioner's contention is that the so-called dividends paid to the holders of its securities designated Cumulative Preferred Serial Stock were payments which it contracted to pay for the use of money borrowed from the security holders for a definite and limited time and that said payments were in fact interest despite the name given to them.

The Statutory Definition of Dividend Is Not Applicable.

Respondent states that the payments to the holders of petitioner's securities come within the definition of dividends as contained in Section 115(a) of the Revenue Act of 1936. The statutory definition of dividends includes only distributions to stockholders. If, as petitioner contends, the terms and conditions of the securities establish that the holders thereof were creditors and not stockholders, Section 115(a) clearly has no application.

Incidental Facts Did Not Change Petitioner's Obligation to Its Security Holders.

Respondent points to several incidental facts such as the inclusion of the securities in the Certificate of Incorporation as part of the authorized capital, the statement in the prospectus that in the opinion of counsel "dividends" would not be subject to normal income tax, and the failure of petitioner to take deductions for the payments in its income tax returns prior to 1937.

None of the mentioned facts in any way changed the terms and conditions of the securities or relieved petitioner from its obligation to repay the principal and so-called dividends on or before the maturity dates specified. It cannot be doubted that all parties understood that the investment was for a definite period, for a fixed rate of return and that the principal and so-called dividends were to be paid on or before maturity from the general assets of petitioner, if necessary. Those facts were stressed in all the negotiations and documents, including those in which the opinion of counsel with regard to the taxability of the so-called dividends was stated.

The securities considered in *Commissioner v. Proctor Shop, Inc.*, *supra*, were also listed as part of the capital stock of the corporation, but that fact was not considered important by the court. The fact that counsel were of the opinion that the so-called dividends were not subject to normal tax is of no greater importance than the fact that the securities were named stock and the payments were named dividends and the opinion was undoubtedly influenced by the names used. The courts have held without exception, that the true character of a security is to

be determined from its terms and not by the names used by the parties.

The payments were treated as dividends on the tax return for the reason that the persons who prepared the returns accepted the names given to the payments as indicating their true character without inquiring into the terms of the securities. [R. 132.]

The So-Called Dividends Were Not Limited to Earnings and Profits.

Respondent's statements that the so-called dividends were to be paid from surplus or net profits is not entirely correct. The current payments were to be made out of the surplus or profits but upon maturity or prior liquidation any accumulated payments were enforceable against the general assets of petitioner, the same as any unconditional claim or debt. [R. 185, 188.] Petitioner's liability to pay the so-called dividends at the annual rate specified was in no way limited by its surplus or profits. A similar provision was contained in the securities considered in *Commissioner v. O. P. P. Holding Co.* (CCA—2, 1935), 76 F. (2d) 11.

The Cases Relied on by Respondent Are Distinguishable.

Respondent cites and quotes extensively from the opinion of this Court in *In re Culbertson's*, 54 F. (2d) 753 and *Armstrong v. Union Trust & Savings Bank*, 248 F. (2d) 268. The cited cases were bankruptcy and receivership proceedings in which holders of securities designated preferred stock sought to share with the general creditors in

the distribution of the assets. All the court was required to decide was whether the holders of the particular securities were entitled to share with general creditors. Courts have always been loathe to allow holders of securities called stock to share equally with general creditors in insolvency proceedings, particularly where the holders of such securities have been held out as stockholders with the right to share in profits and excess assets on dissolution. Furthermore, the right to share with general creditors is not essential to indebtedness for even where the rights of holders of a particular security were expressly made subordinate to the rights of general creditors this and other courts have held that the securities were nevertheless debts.

Commissioner v. Proctor Shop, Inc. (CCA—9, 1936), 82 F. (2d) 792;

Commissioner v. O. P. P. Holding Co. (CCA—2, 1935), 76 F. (2d) 11.

Also, the terms of the securities considered in the cited cases differed in material respects from the terms of petitioner's securities. In *In re Culbertson's, supra*, the court construed the agreement to require the payment of dividends only from profits. Petitioner's agreement specifically required the payment of the so-called dividends from general assets, if necessary, upon the maturity dates or upon prior liquidation. [R. 185, 188.]

In *Armstrong v. Union Trust & Savings Bank, supra*, in the portion of the opinion omitted from respondent's quotation, the court stated:

"These certificate purchasers must be held to full knowledge and appreciation of the real character of their investments, and that they were to become

participants in the enterprise, and not mere creditors of the corporation. To intimate otherwise would be to impugn their intelligence. *No doubt they expected to share in whatever dividends were declared on the stock after payment of the stipulated interest, and to await the declaration of such dividends until the earnings of the capital stock would warrant such action. They could not well expect such dividends and at the same time claim that their certificates constituted them creditors.* Creditors are entitled to no dividends on their demands. What they might get from the company would go in the way of a discharge of the liability, either partially or entirely. The two positions are wholly inconsistent. They must be considered either stockholders or creditors. They cannot be both.” (Italics supplied.)

Unlike the security holders in the *Armstrong* case, the holders of petitioner’s securities had no right whatsoever to participate in any profits of petitioner for it was specifically provided that they should receive no more than the specified annual percentage. [R. 157, 192.]

It is submitted that *Armstrong v. Union Trust & Savings Bank, supra*, and *In re Culbertson’s, supra*, are distinguishable both on the facts and the issues from the case at bar. It is of interest to note that neither of said cases was apparently considered sufficiently in point to be cited by this Court in the two cases subsequently decided by this Court on the exact issue here involved.

Commissioner v. Proctor Shop, Inc. (CCA—9, 1936), 82 F. (2d) 792;

Commissioner v. Palmer, Stacy-Merrill, Inc. (CCA—9, 1940), 111 F. (2d) 809.

In the case at bar there was more than a mere agreement to redeem. Petitioner's securities stated a definite maturity date for each security. Upon arrival of the maturity date petitioner had a definite obligation to repay the principal sum and any unpaid so-called dividends regardless of profits. This obligation was not dependent upon any election by petitioner or the holders of the securities but was imposed by the terms of the security itself and was enforceable against the general assets of petitioner, the same as any unconditional claim or debt. The right of the holders of said securities to receive annual payments ceased upon the maturity date and the holders had no further rights, except to receive repayment of the principal and so-called dividends accumulated prior to the maturity date. The above provisions were all expressly stated in the contract between petitioner and the security holders. Such conditions are consistent only with indebtedness and are not consistent with a stockholder's interest in a corporation.

Such conditions were not contained in the securities considered in any of the cases cited by respondent.

Furthermore, in *Kentucky River Coal Corporation v. Lucas*, 51 F. (2d) 586, the decision of the court seems to be based upon the conclusion that the rights of the holders of the securities in question were subordinate to the rights of general creditors. In *Commissioner v. Proctor Shop, Inc.*, 82 F. (2d) 792, this Court held the security to be indebtedness, even though the rights of the holder thereof were specifically made subordinate to the rights of general creditors. The Circuit Court of Appeals for the Second Circuit rendered a similar decision in *Commissioner v. O. P. P. Holding Co.*, 76 F. (2d) 11. It also appears, as re-

spondent states, that in *Kentucky River Coal Corp. v. Lucas, supra*, the dividends were limited to surplus profits and earnings.

In *Finance & Investment Corporation v. Burnet* (C. A. D. C. 1932), 57 F. (2d) 444, and *Jewel Tea Co. v. Burnet* (CCA—2, 1937), 90 F. (2d) 451, no date was fixed for the maturity of the securities. It is well settled that one of the essential elements of a debt is a definite maturity date fixed in advance. (*Commissioner v. Schmoll Fils Association, Inc.* (CCA—2, 1940), 110 F. (2d) 611; *Elko Lamoille Power Co. v. Commissioner* (CCA—9, 1931), 50 F. (2d) 595.)

In *Koeppler v. Crocker Chair Co.*, 200 Wis. 476, 228 N. W. 130, the holders of the securities had the right to participate in the assets on liquidation.

Petitioner submits that the authorities cited by respondent are not inconsistent with petitioner's contentions and do not support respondent's contentions herein. It is further submitted that the decision of the Board of Tax Appeals herein was erroneous and contrary to the decisions of this Court in *Commissioner v. Proctor Shop, Inc., supra*, and *Commissioner v. Palmer, Stacy-Merrill, Inc., supra*, and should be reversed.

Respectfully submitted,

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May, 1942.

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IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

No. 10,045.

GRAYSON HEAT CONTROL, LTD.,
Plaintiff-Appellant,
vs.

LOS ANGELES GAS APPLIANCE CO., INC.,
Defendant-Appellee.

PLAINTIFF-APPELLANT'S REPLY BRIEF.

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PLAINTIFF-APPELLANT'S REPLY BRIEF.

**RE GRAYSON PATENT 1,699,468 (R. 632) CLAIMS 20
AND 22 IN SUIT.**

The Defense of New Matter and Lack of Oath.

Defendant's brief, pages 7-17, seeks to support Judge Jenney's holding of invalidity of claims 20 and 22, which was based on the erroneous belief that freedom for radial expansion of Grayson's clicker disc constituted a mechanical element of these claims and that this feature constituted new matter unsupported by oath.

In its brief opposite page 13, defendant has presented a tabular comparison between claims 20 and 22 in suit and

rejected and cancelled claim 21. Such a chart might be pertinent to a question of infringement, since it is axiomatic that a patent claim containing a specific limitation not included in a cancelled claim cannot be construed so as to disregard such limitation. Defendant nowhere argues, however, that the limitations appearing in the fourth and fifth columns of its chart are not found in defendant's structure. The chart has no pertinency regarding infringement.

Invalidity on the ground of new matter or lack of oath obviously cannot be established or affected by any comparison of the claims in suit with any claim presented by amendment simultaneously with the claims in suit.

Appellee's chart is not devoted to non-infringement, and establishes nothing respecting the alleged newness of the segregated matter. Irrespective of its charm, it has no utility in this case.

Apparently appellee desires this Court to believe that the patentable novelty in claims 20 and 22 resides in the radial expansion of the disc. Two reasons refute this fallacy:

(1) The distinction between the claims in suit and cancelled claim 21 resides in the mechanical mounting of the disc, that is, in its loose support which permits radial expansion, and not in the radial expansion itself which is merely a function or result of such loose support.

(2) Patentability of a combination does not depend upon the novelty of any element. The invention of a combination claim resides in that combination which, if novel, produces a new result or an old result in a better or more facile manner, and the elements of which the combination consists may be all old or all new or partly old and partly new.

Elaborating upon reason (1), it has been shown in plaintiff's main brief, pp. 17-20, that the Grayson application as originally filed described the diaphragm or clicker disc as being "comparatively loose . . . the extreme edge being free" and "may snap over" (R. 689). Again, the original application stated that the supporting means for the disc "leaves the edge of the disc comparatively loose and free" (R. 691). And again, the disc was described as "resting freely at its edge on said shoulder" (R. 637). The loose mounting of the disc was unquestionably disclosed in the Grayson application as originally sworn to and filed.

In the trial of this case, a disc thus loosely mounted was repeatedly referred to as a "full floating" disc. A full floating clicker disc was defined as:

"a clicker disc which is dropped into the assembly, without any clamping around the periphery or at the center. It means a clicker disc so mounted that when we attempt to crowd the metal through, as we must do in getting a clicker action, the metal has to go somewhere, we have it free to expand toward the outside, and that cuts the forces down to something like one-fifth of what they are in the anchored type." (R. 189.)

That a disc thus loosely supported is inherently free to expand radially was repeatedly recognized by the experts for both parties in this case. Plaintiff's expert, Mr. Fishleigh, in referring to the Grayson disc said in referring to it as full floating:

"By that I mean a disc which is supported, as explained in the patent, so that it is loosely supported around its periphery and in no way anchored or clamped; and therefore, being free to expand radially as we attempt to snap it by center." (R. 217.)

In referring to the Spencer patent 1,678,407 in which the disc is clamped around the margins of the center opening, Mr. Fishleigh said that this was not a full floating clicker disc

“and is not capable of full radial expansion in the sense of both the patents in suit and the defendant’s disc. It is restricted at the center, a substantial restriction, so that the forces required to click it past center are large compared to what the Grayson two patents show, or like the defendant’s structure, and I know that from tests I have run.” (R. 291.)

Likewise, defendant’s expert, Mr. Weinberg, recognized that a disc loosely supported at its marginal edge is inherently capable of radial expansion. Referring to Spencer patent 1,681,911, in which he said the disc was “loosely supported at its marginal edge,” he, on direct examination regarding this disc, testified:

“Q. And is that disc free to expand to whatever extent there may be radial expansion in the disc?

“A. Yes, in so far as its support is concerned.” (R. 454.)

Again, referring to Spencer patent 1,678,407 which discloses a clicker disc having the edges unconfined, Mr. Weinberg testified on direct examination:

“Q. Do you find that the outer marginal edge of the disc 15 is free so that radial expansion of said disc under pressure is permitted?

“A. Yes.” (R. 464.)

Again, in comparing the Grayson disc 30, defendant’s disc 4, and the disc 15 of Spencer patent 1,678,407, Weinberg testified:

“Each of the snap-action devices are further similar in that they are allegedly free to expand radially or diametrically. The peripheral edge 4a of the accused snap ring and the peripheral edge 15a of the Spencer device are both supported without contact with a surrounding or supporting structure, whereby at least, in so far as their support is concerned, the same are free to expand diametrically.” (R. 490.)

Again, regarding the Grayson disc, Weinberg testified:

“I measured the expansion of the Grayson snap

disc, and found that the diametrical expansion of that disc was between one and two-thousandths of an inch.” (R. 512.)

The experts are agreed, no one disputes, and everyone knows that a clicker disc loosely supported with its edges free to snap over when pressure is applied to the disc is inherently capable of radial expansion and does radially expand when snapped over. If the disc be confined around its perimeter, it cannot expand radially. It is the mounting which determines whether or not the disc can expand and it is the mounting, that is, the mechanical support for the disc, which distinguishes the claims in suit from cancelled claim 21.

When a disc is loosely mounted with its peripheral edges unconfined, as it is in plaintiff’s and defendant’s structures, only one-fifth the force is required to snap it over as is required when the edges are clamped or confined (R. 189 and 588-591).

When a disc is thus loosely mounted, it is *ipso facto* and inherently free for radial expansion. The loose mounting necessarily permits radial expansion. Radial expansion requires a loose mounting. The loose mounting, not the radial expansion, is the structural feature of the claims in question.

Claim 20 specifies that the disc is “mounted in said body so that the marginal edge thereof is loosely supported.” Incidentally it adds that the radial expansion of the disc under pressure is permitted.

Claim 22 specifies that the disc is “*mounted* so as to be free to expand radially when pressure is applied thereto.” (Emphasis ours.) A disc mounted in this manner is of necessity loosely mounted, or it would not be free to expand radially. In this claim also it is the *mounting*, that is, the structural support for the disc, that differs over rejected claim 21.

When Grayson amended his application which *ab initio* disclosed and described a disc loosely supported, he merely explained why a statement in his original specification that

“if a diaphragm as small in diameter . . . were clamped at the edge, it could have no snap action”

was true. The explanation added was

“because radial expansion of the disk under pressure would not be permitted in such a construction.”

By this amendment Grayson merely elucidated a scientific principle of his invention. He explained an added advantage of the structure originally disclosed, and referred to the characteristic of radial expansion inherent in the loosely supported disc originally disclosed. This explanation was not new matter. (See authorities under Points 5, 6 and 7 of plaintiff-appellant's main brief.)

Referring to reason (2) above noted, that the patentability of a combination claim does not depend upon the novelty of any element, the rule is well stated in *Leeds & Catlin Co. v. Victor Talking Mach. Co.*, 213 U. S. 325, 53 L. Ed. 816:

“A combination is a composition of elements, some of which may be old and others new, or all old or all new. It is, however, the combination that is the invention, and is as much a unit in contemplation of law as a single or noncomposite instrument. Whoever uses it without permission is an infringer of it. Whoever contributes to such use is an infringer of it.”

In *Heim Grinder Co. v. Fafnir Bearing Co.*, 13 F. (2d) 408, the doctrine was recognized in the following language:

“If a claim covers a true combination, the novelty of the elements severally, is a moot question.”

It is manifest, therefore, that the patentability of claims 20 and 22 does not depend upon the novelty of the loosely supported disc by which they differ from cancelled claim 21, but depends upon the novelty of the combination in-

cluding this loose support which resulted in the undisputed advantages set forth in the testimony and succinctly stated at pages 61-63 of the record.

It is also manifest that the loosely supported disc disclosed in the Grayson application as originally filed was inherently capable of radial expansion, and that when such disclosure was made the public needed only to follow such disclosure and loosely support the disc to obtain all of the advantages and functions of the device. The explanation,

“because radial expansion of the disc under pressure would not be permitted in such a construction”

added by amendment to the original statement:

“if a diaphragm as small in diameter as the present one were clamped at the edge, it could have no snap action”

was not a disclosure of a new structure or a new principle or mode of operation. It merely explained why the originally disclosed structure could be operated with so little pressure and consequently possessed such high sensitivity. In no sense of the patent law was it new matter.

Cases Relied Upon by Appellee Distinguished from the Facts Here Presented.

While the selected language quoted from decisions relied upon by defendant seems on its face to be pertinent, an examination of the cases discloses facts quite foreign to and readily distinguishable in principle from those here presented.

In *Standard Oil Development Co. v. Berry*, 92 F. (2d) 386, the facts, not set forth in this decision but ascertainable from the trial court's decision, 14 F. Supp. 881, show that in that case the original application disclosed the em-

ployment of steam for heating purposes but not for stripping the descending liquids in the tower. The stripping claims sued upon were derived by consent from another patent where they were based upon a substantially different disclosure from that of the application to which they were transferred.

In *Simpson v. Newport News Ship Building and Dry Dock Co.*, 18 F. (2d) 318, the original application failed to claim, as did also the corresponding British patent, the hatch coamings or the hanging therefrom. Subsequently the claims in suit, directed to entirely different subject matter than originally claimed in specifying that the tank was hung from the hatch coaming, were inserted by amendment without oath. This is the type of case in which matter originally disclosed but not claimed under the original oath is required to be supported, if later claimed, by a supplemental oath under the provisions of Rule 48, which reads:

“When an applicant presents a claim for matter originally shown or described but not substantially embraced in the statement of invention or claim originally presented, he shall file a supplemental oath to the effect that the subject matter of the proposed amendment was part of his invention,” etc.

This rule is based on Revised Statutes, Sec. 4892, U. S. Code Title 35, Sec. 35.

No such requirement for new oath is presented in the present case, because the loosely supported disc was claimed in the Grayson application as originally filed. The later added explanation that such loosely supported disc expanded radially when snapped over introduced no structure not originally claimed as a loosely supported disc.

In *Steward v. American Lava Co.*, 215 U. S. 161, 54 L. Ed. 139, the original specification and claims claiming a burner were cancelled and a complete new specification and

claims claiming a process were substituted by the attorney without the inventor's oath. The alleged process was based upon a theory of operation not suggested in the original application.

On page 14 of its brief defendant emphasizes this case, and says that in the Grayson application for the patent in suit "there was introduced not merely the theory, but the mode of applying it, into the specification by an unverified amendment."

Defendant disregards the recognition in the *American Lava Co.* case by the court that:

"A mechanical device will be patentable although the true theory of it is not understood."

This is the pertinent language of this case to the Grayson patent in suit. Grayson disclosed and claimed in his original application a loosely supported disc. From this disclosure the public was taught how to manufacture and use the Grayson thermostat. Whether the public or whether even Grayson knew that such loosely supported disc would expand readily when snapped over was entirely immaterial. The disclosure of the employment of the loosely mounted disc in the novel combination claimed constituted an adequate legal basis for the issuance of the patent. Grayson's amendment introduced no new theory into the case, but simply explained why the loosely mounted disc would snap over easily under light pressure. The doctrine of the *American Lava* case is not applicable in the slightest degree.

The remaining cases quoted from by defendant are even less pertinent than those above discussed, and the selected language based on facts entirely different from those here presented cannot be utilized to militate against the validity of the Grayson patent.

There Is No File Wrapper Estoppel Against Claims 20 and 22.

On page 17 of its brief defendant argues that if freedom for radial expansion is merely a functional statement, then claims 20 and 22 are unpatentable because a function is not subject matter for a patent. Defendant, like Judge Jenney, is confused concerning what is covered by these claims. It is the structural mounting of the disc, that is, the mounting so that the marginal edge is loosely supported, which is claimed. Since freedom for radial expansion is inherent in a disc thus loosely supported and is impossible in a disc confined around its periphery, it is immaterial whether we say the disc is mounted so that it is loosely supported or whether we say it is mounted so as to be free to expand radially. It is the mounting that is important. A mounting which loosely supports the disc affords freedom for radial expansion and a mounting which permits the disc to expand radially must of necessity support the disc loosely.

This mounting is what permits the novel combination defined by the claims to operate in the novel manner and give the advantageous results so clearly set forth in the record of this case and evidenced by the commercial success of the Grayson thermostat. The patentability is in the combination, not in any particular element thereof. Freedom for radial expansion of the disc is an inherent characteristic of the loose mounting which is claimed. There is no file wrapper estoppel against the validity of these claims.

On pages 18 and 19 of its brief, defendant appears to be again confused in attempting to apply the law of file wrapper estoppel respecting infringement to the question of invention or patentability. We are in entire accord with

the doctrine that a claim distinguishing from a cancelled claim by a limitation cannot be stretched by construction to bring within its scope a structure not containing that limitation. The doctrine, however, has no pertinency here, because defendant does not contend that its disc is not mounted so as to be loosely supported and consequently free for radial expansion.

Claims 20 and 22 and the Prior Art.

Appellee's brief, pages 23-34, is devoted to alleged invalidity of claims 20 and 22 of Grayson patent 1,699,468 over the prior art.

In connection with the question of validity, attention is first directed to the authorities pertinent here listed under Points 10, 11 and 12 of appellant's Points and Authorities appearing on page 8 of appellant's main brief.

Attention is further directed to the fact that claims 20 and 22 here in suit were held valid and infringed in a previous suit in the Southern District of California entitled *Grayson Heat Control, Inc., v. E. R. Parker et al.*, Equity No. R-117-M. The decree in that suit appears herein as Exhibit 4, R. 650.

Appellee here urges four prior art patents which will now be briefly discussed.

MERRICK PATENT 1,542,712 (R. 884).

Respecting this patent Judge Jenney stated:

"The master found, and the court agrees, that the prior patent to Merrick, No. 1,542,712, . . . is the closest reference." (R. 59.)

The Merrick patent was a file reference cited by the Patent Office against the Grayson application, and the claims in suit as well as others were allowed over it.

The Merrick valve does not embody the single axis symmetrical force application principal of Grayson, but, on the contrary, Merrick's thermostat rod 15 is offset laterally from the axis of the spring diaphragm 29 and a fulcrumed lever, a post and a resilient pusher member are interposed between the thermostat rod and the diaphragm to amplify, as well as transmit to the diaphragm, the motion of the thermostat rod. This structure, because of the leverage involved, produces strains, friction and wear upon the lever fulcrum and moving parts, diminishes the sensitivity of the device and results in inaccuracy of functioning.

Merrick does not have the full floating clicker disk of Grayson, but, on the contrary, employs a cup shaped spring diaphragm rigidly anchored around its perimeter and clamped between opposed sections of the valve casing. The diaphragm is not loosely, but rigidly, supported and is not free for radial expansion, but is confined against and precluded from, radial expansion.

The very essence of the Grayson principal, including the single axis symmetrical application of force principal, and the full floating clicker disk, free for radial expansion, which enables snap-over to be accomplished with one-fifth of the force required to snap over a confined disk restrained against radial expansion, is totally absent from the Merrick disclosure.

A graphic comparison between the mechanical elements defined by claims 20 and 22 of the first Grayson patent and the structure of the Merrick patent is made in the Fishleigh chart, Plaintiff's Exhibit 30, from which it will be apparent that Merrick fails as anticipatory of claim 20 in that Merrick's diaphragm is not "mounted in said body so that the marginal edge thereof is loosely supported and radial expansion of said disk is permitted," and the "resilient push disk 30" of Merrick's does not meet the re-

quirements of the claim for a plunger “bearing on one side on the convex side of said disk near the edge thereof, and on the other side in operative relation with the thermostat.” Merrick’s resilient push disk is not in operative relation or engagement in the sense of the Grayson patent with the thermostat but the lever 19 and the post 32 are interposed between the thermostat and the push disk. The post 32 of Merrick, not the thermostat, is in the operative relation to the push disk 30 that Grayson’s thermostat rod is to his plunger.

Similarly, Merrick fails to anticipate claim 22, which requires that the disk be “of small diameter but mounted so as to be free to expand radially when pressure is applied thereto.” Merrick’s diaphragm is neither of small diameter nor is it mounted so as to be free to expand radially.

Like claim 20, claim 22 also requires that the plunger bear at one side on the disk and on the other side in direct operative relation with the thermostat. This direct relation required by the claim is not fulfilled by the indirect relation between the thermostat rod and the push disk 30 of Merrick, which involves the objectionable offset lever mechanism common to the prior art, and the elimination of which is one of the advantageous features of the Grayson invention.

Regarding the tests made by defendant’s expert and referred to on page 31 of appellee’s brief, the Court’s attention is directed to a complete refutation of these tests appearing in the record on pages 585-593. This testimony shows that Weinberg’s tests were valueless and the alleged results thereof were misleading. This testimony further conclusively shows that a loosely supported disc unconfined around its perimeter requires only one-fifth the force to snap it over that is required by a clamped disc such as Merrick’s.

It is manifest, therefore, that the patent office, the Master and the Court in the prior suit upon the Grayson patent, and the Master and the Court in the present case were all correct in unanimously holding that the Merrick patent does not anticipate the claims here in suit of the first Grayson patent.

EGGLESTON PATENT 1,541,929 (R. 996).

This patent was not pleaded nor was notice of it given prior to the trial. It cannot, therefore, be used for anticipatory purposes, but merely as illustrative of the art.

The Eggleston patent discloses a thermostatic air valve, comprising a sylphon bellows containing a volatile liquid. The outer end 16 of the bellows carrying the valve 13 adapted to close against the seat 14 is made of spring material so that under internal pressure this end is convexed outwardly, as shown in Fig. 1, and under vacuum it is convexed inwardly, as shown in Fig. 7. This end, however, is fixedly connected and sealed around its perimeter to the surrounding wall of the bellows. It is not loosely mounted and is not free for radial expansion, but its reversal from convex to concave form is accomplished by an undulatory movement of the disk, like the spring diaphragm of the Merrick patent, previously discussed. This action is similar to that of the bottom of an oil can which can be pressed over center, but the amount of force required to press such a peripherally anchored diaphragm over center is five times that required to actuate a full floating disk free for radial expansion, of the type employed by Grayson (R. 164).

In Eggleston the end 16 is a part of the thermostat itself. Eggleston has no thermostat independent of the end 16; he has no full floating clicker disk, he has no plunger acting directly between a thermostat and a radially

expansible disk, as required by claims 20 and 22, here in issue. Eggleston does not negative invention in the structure defined by claims 20 and 22 of the first Grayson patent.

SPENCER PATENT 1,681,911 (R. 1004).

This patent, like the Eggleston patent above discussed, was not pleaded nor was notice of it given prior to its presentation at the trial before the Master. It can only be considered as illustrative of the art, and cannot be used for anticipatory purposes.

In this Spencer patent the disc itself is the thermostat which actuates the valve 20. This device is quite different in structure and principle of operation from the Grayson combination in which a rod and tube thermostat projecting into a water storage tank, moves a plunger to symmetrically transmit force to a coaxially disposed full floating clicker disk, free for radial expansion, and which is caused by the plunger to snap over into reverse position, thereby actuating a valve.

Spencer employs a bi-metallic thermostatic disk as the thermostat for initiating movement. Grayson employs a full floating clicker disk for converting the motion directly and coaxially transmitted to it from a thermostat, into a snap-action movement, which actuates a valve. The Grayson combination, defined in claims 20 and 22, is entirely absent from the disclosure of this Spencer patent.

SPENCER PATENT 1,678,407 (R. 894).

This patent discloses an electric switch embodying a rod and tube thermostat to the rod of which is anchored a clicker disk which serves when in one position as an electrical conductor to close the circuit and when in reverse position to open the circuit.

In the Grayson patented device when the thermostat is hot, the valve is closed. In the Spencer switch when the thermostat is hot, the circuit is open (R. 378). The Spencer device is not a device of the character described in the Grayson patent, *i.e.*, a thermostatically operated valve, but is a switch.

The Spencer patent does not disclose "a main body" in the sense of the Grayson patent. This is admitted by defendant's expert (R. 553, 572).

The Spencer patent does not disclose "any member adapted to be thermostatically operated" in the sense that this language is used in the Grayson patent (Weinberg R. 568).

Since Spencer has no member corresponding to Grayson's valve member, it has, consequently, no "means for transmitting motion from said thermostat to said member."

Having no such member, Spencer has no spring action disk mounted in a body with a normally concave side toward such a member.

Furthermore, Spencer has no "plunger" in the sense of Grayson.

Defendant's expert on direct examination attempted to argue that the rod 13 of Spencer was a plunger, but on cross he stated:

"Q. Then it is your opinion that the rod 13 is the plunger, is it?

"A. I am afraid not." (R. 570.)

Referring to Spencer, defendant's witness Jenkins admitted concerning the top nut 16, "It is not a plunger." (R. 379.)

"Q. Spencer does not disclose any valve?

"A. No.

"Q. He does not disclose the spring for operating the valve?

“A. No.

“Q. He does not disclose any flange or other means between the disk and a valve for operating it?

“A. No.” (R. 381.)

The Spencer patent obviously does not anticipate or invalidate in any sense either of the claims in suit of the Grayson patent. In addition to defendant's admissions to that effect to which references in the record are made above, attention is called to the substance of Mr. Fishleigh's testimony on this point which is graphically summed up in plaintiff's chart (Ex. 30).

A Selection from Different Places in the Prior Art of Individually Old Elements Does Not Defeat a Combination Claim.

Appellee has presented four prior art patents purporting to disclose various elements of the Grayson combination defined by the claims in suit. No attempt, however, has been made to show that these various elements could be assembled to produce an operative device in anticipation of the Grayson combination. None of these patents discloses a loosely mounted clicker disc interposed between a valve and a thermostat and arranged coaxially with the thermostat and directly actuated thereby without the interposition of levers so as to be snapped over by the thermostat to magnify the movement of the thermostat and transmit such magnified movement to the valve.

A patent for a combination accomplishing, as here, a new and useful result is not anticipated, because the parts of the combination may be individually old.

The Telephone Cases, 126 U. S. 1, 31 L. Ed. 863.

Hobbs v. Beach, 180 U. S. 383, 45 L. Ed. 586.

Chicago Lock Co. v. Tratsch et al., 72 F. (2d) 482, 487 (C. C. A. 7).

Adam v. Folger, 120 F. 260, 262 (C. C. A. 7).

“Where the thing patented is an entirety, consisting of a single device or combination of old elements, incapable of division or separate use, the respondent cannot escape the charge of infringement by alleging or proving that a part of the entire thing is found in one prior patent or printed publication or machine, and another part in another prior exhibit, and still another part in the third one, and from the three or greater number of such exhibits draw the conclusion that the patentee is not the original and first inventor of the patented improvement.”

Bates v. Coe, 98 U. S. 31, 25 L. Ed. 68.

This doctrine has been consistently followed. See
Imhaeuser v. Buerk, 101 U. S. 647, 25 L. Ed. 945.
Adams v. Bellaire Stamping Co., 141 U. S. 539, 35
 L. Ed. 849.
Parks v. Booth, 102 U. S. 96, 26 L. Ed. 54.
Seabury v. Am Ende, 152 U. S. 561, 38 L. Ed. 553.

Respecting the Alleged Functionality of Claims 20 and 22 of Patent 1,699,468.

On pages 34 to 36 of its brief appellee repeats its contention discussed *supra* that the functional radial expansion of the disc constitutes the only novelty of the claims and that they are void for functionality.

This contention is fallacious for two reasons:

- (1) It is the structural mounting of the disc, and not its function of radial expansion resulting from the mounting, that is defined in the claims.
- (2) The patentable novelty resides in the combination of elements defined by the claims, and not in any single element.

Respecting Infringement of Claims 20 and 22.

The only point of noninfringement that defendant attempts to argue in its brief is that defendant's structure does not embody the "plunger" included in claims 20 and 22. Defendant bases this argument upon the unsupported assertion that the flexible levers against which the outer margin of the concave face of defendant's disc rests "*may be considered as the plunger.*" (Italics ours.)

It is manifest without argument that the plunger 5 (Exhibit 1) which defendant prefers to call a "hub" is the plunger of these claims. A few excerpts from the record will show that defendant's contention is utterly unsustainable.

Previously to the filing of appellee's brief, no contention was ever advanced in this case that defendant's flexible levers *may be considered* as the plunger. Only one witness in the entire case had the temerity to suggest that the element 5 (Exhibit 1) was not a plunger. This witness was defendant's expert Weinberg, who thought that an element could not be a plunger unless it was surrounded and slidingly engaged in a cylinder:

"Q. With reference to the plunger, I understand it to be your opinion that defendant does not employ a plunger because the member 5 is not surrounded—slidingly engaged in a cylinder, is that correct?

"A. Yes, sir." (R. 573.)

Defendant's other witness who testified on this point, Mr. Jenkins, the president of the concern that manufactures defendant's infringing thermostats, did not question that the element 5 (Exhibit 1) was a plunger:

"Q. In the accused device the disc is mounted right on the plunger?

"A. That is right." (R. 358.)

In discussing Defendant's Exhibit E, which is an en-

largement of Exhibit 1, and Exhibit O, which was a drawing of a theoretical construction concocted by defendant, Mr. Jenkins said:

“Q. By Mr. Wilson: The operation of the hub or snap ring hub in Exhibit E, and the operation of the plunger in Exhibit O, upon the amplifying levers, is the same in both cases?

“A. On the amplifying element they are the same in both cases.

“Q. So the only difference between these two is that you carry the disc or snap ring on the plunger in Exhibit E, and you carry it on a separate member rigid with the casing in Exhibit O?

“A. Yes, or in other words, we can say in Exhibit E it is a combination hub which supports the ring, and adds amplification to the amplifying element. In Exhibit O it adds amplifications to the levers, and is not a support for the snap ring.

“Q. The functions the two devices perform are the same, except that in the accused device the plunger performs also the function of supporting the disc?

“A. Yes.

“Q. I think you have already testified that the operation and results are the same.

“A. Substantially the same.

“Q. One is the equivalent of the other?

“A. Yes.” (R. 370.)

There was no doubt in the mind of plaintiff's witness Mr. Fishleigh regarding defendant's plunger. In referring to the structure of the Grayson patent as compared with the accused device, Mr. Fishleigh testified:

“In either case, however, what we get is this: We get the force and the movement of the thermostat applied to a plunger and from the plunger to the clicker disc, in either case getting both clicker action and amplified movement; and that is all there is to the whole proposition of using the clicker combination and it is one of mechanical equivalency.” (R. 272.)

Master Head, before whom this case was tried, in describing in his report defendant's accused device, said:

“A hub or plunger 5 supports an annular snap ring 4.” (R. 38.)

In amplification of his views on this point, the Master in his report further stated:

“The term ‘plunger’ as used in the specifications and claims of the patent must be considered in the sense in which the patentee used it. ‘The question is not one of nomenclature but of mechanics.’ *Carlson Motor etc. Company v. Maxwell Briscoe Company*, 197 F. 309 at 315. Defendant attempts to define the term as synonymous with piston. A piston is a plunger but also the dasher of the old fashioned churn can be defined likewise. In the Grayson structure the plunger is guided by a cylindrical bore in the body. In the defendant’s device the corresponding part is unsupported at this point but is pinned to the thermostatic rod. The function of both is to apply the movement of the rod to the disk. They are clearly mechanical equivalents.” (R. 41.)

Judge Jenney in his opinion in describing defendant’s device, stated:

“A hub or plunger 5 supports an annular snap ring 4.” (R. 59.)

In Finding of Fact No. (12), Judge Jenney found as follows:

“The Defendant’s alleged infringing device, as depicted by Plaintiff’s Exhibit 24, reference being had to Figure 1 thereof, operates on the same general principles as the Grayson thermostats. A hub or plunger 5 supports an annular snap ring 4. Ring 4 is a clicker disk, which is capable of being snapped over center, returning through its own resiliency.” (R. 76.)

In view of this record appellee’s half-hearted suggestion in its brief that the flexible levers in defendant’s structure “may be considered as the plunger” merits scarcely momentary consideration.

The rule to be followed here has been well stated by this Court of Appeals in the following cases:

“Defendants therefore cannot escape infringement by adding to or taking from the patented device by changing its form, or even by making it somewhat more or less efficient, while they retain its principle and mode of operation and attain its results by the use of the same or equivalent mechanical means. *Lourie v. Lenhart*, 130 F. 122, 64 C. C. A. 456; *Letson v. Alaska Packers Association*, 130 F. 129, 64 C. C. A. 463; *Eck v. Kutz* (C. C.), 132 F. 758.”

Angelus Sanitary Can Mach. Co. v. Wilson, 7 F. (2d) 314 (C. C. A. 9).

“As already suggested, the patent in suit is for a combination and neither party rests any argument upon the difference in type of the two valves employed. Both valves are common and well-known forms of check valves, and as was said by the court below, ‘open by gravity in the direction of the flow of the fuel. They perform the same function in substantially the same way, and accomplish the same result, and therefore in the sense of the patent law are the same thing.’ While Jay’s invention cannot be accorded a broad scope, it constituted a distinct advance in the art, entitling him to a reasonable range of equivalents. ‘Where a combination patent makes a distinct advance in the art to which it relates, as does the appellant’s invention here, the term “mechanical equivalent” should have a reasonably broad and generous interpretation.’ *Smith Cannery Mach. Co. v. Seattle-Astoria Iron Works* (C. C. A.), 261 F. 85. ‘We have repeatedly held that a charge of infringement is sometimes made out, though the letter of the claims be avoided.’ *Westinghouse v. Boyden Power-Brake Co.*, 170 U. S. 537, 568, 18 S. Ct. 707, 722 (42 L. Ed. 1136). See also *Hoyt v. Horne*, 145 U. S. 302, 308, 12 S. Ct. 922, 36 L. Ed. 713; *Kings County Raisin & Fruit Co. v. U. S. Consol. Seeding Raisin Co.* (C. C. A.), 182 F. 59; *Los Angeles Co. v. Nye* (C. C. A.), 270 F. 155; *Metallic Extraction Co. v. Brown* (C. C. A.), 104 F. 345.”

Jay et al. v. Suetter et al., 32 F. (2d) 879 (C. C. A. 9).

**RE GRAYSON PATENT 1,957,774 (R. 640) CLAIM 10
IN SUIT.**

Validity.

Appellee's brief, p. 34, states that it will rely upon the District Court's opinion holding the claim invalid over the art without further comment.

The prior art relied upon by the Court having been discussed in appellant's main brief, pp. 38-42, nothing further need be added.

Infringement.

Appellee states that it will rely upon the Master's finding that claim 10 is not infringed.

Although the Master's holding of non-infringement was overruled by the District Court, the question of infringement will be here discussed.

On the chart, Ex. 27, a graphic comparison is made between the elements recited in claim 10 of the second Grayson patent and defendant's thermostat. Reference to this chart will show that defendant's structure embodies structurally and functionally every element of the combination defined by claim 10 and operating in the same manner to produce the same result. Structurally and functionally claim 10 finds full response in defendant's structure. Literally, however, one element of claim 10 fails to read verbatim upon defendant's structure because defendant while accomplishing the identical result of the patented structure and in practically the same manner, employs a lever of a different type from that disclosed in the Grayson second patent for amplifying and transmitting to the valve the motion imparted by the clicker disk. This lever, which is element 6 of the claim, is defined in the claim as follows:

“A movement amplifying lever pivotally supported at one end and arranged to have movement communicated thereto intermediate its ends by the snap-action element, said lever having its free end arranged to communicate movement to the valve.”

The lever thus defined as “pivotally supported at one end” is a lever of the type commonly known in mechanics as a lever of the third order.

As this Court well knows, mechanical levers are of three orders or types. A lever of the first order has its fulcrum or pivot at one end, the power is applied at the other end and the load is disposed between the ends. A wheelbarrow, for instance, constitutes a lever of the first order.

A lever of the second order is pivoted or fulcrumed intermediate its ends, the power is applied at one end and the load is disposed at the other end. A crowbar when used for prying purposes is a lever of the second order. Defendant's lever fulcrumed between its ends is a lever of this second order.

A lever of the third order is fulcrumed or pivoted at one end, the power is applied intermediate its ends and the load is disposed at the other end. A fish-pole as commonly used constitutes a lever of the third order. Plaintiff's lever 54 in the second Grayson patent is a lever of the third order.

These three orders of levers are as old as mechanics. They are illustrated in every mechanical dictionary and are commonly known to be equivalents one for the other.

At the trial before the Master, plaintiff's expert Mr. Fishleigh characterized defendant's lever of the second order as “a perfectly clear schoolboy mechanical equivalent” of plaintiff's lever of the third order (R. 276). Defendant did not deny that equivalency.

The courts have repeatedly held that levers of different orders are purely mechanical equivalents. The following cases are typical:

Star Can Opener Co. v. Owen Dyneto Co., 16 Fed. (2d) 353 (C. C. A. 2d).

Hoeltke v. Kemp, 80 Fed. (2d) 912 (C. C. A. 4th).
Certiorari denied, 298 U. S. 673.

The Master held, incorrectly we believe, that defendant's lever of the second order is not the mechanical equivalent of the Grayson lever of the third order included in claim 10 (R. 43).

Judge Jenney, however, in sustaining plaintiff's objection to the Master's finding of non-infringement of this claim, said:

"The conclusion of the Court is that the specification of the form of the lever in claim 10 does not prevent the application of the doctrine of equivalents to that element." (R. 69.)

We submit that Judge Jenney's ruling on this point is correct, and his holding of infringement of claim 10 should be sustained by this Court.

Conclusion.

The District Court's indications in its opinion and findings that claims 20 and 22 of patent 1,699,468 are valid over the art and that these claims, as well as claim 10 of patent 1,957,774, have been infringed are supported by the record and should be approved.

The decree holding claims 20 and 22 of patent 1,699,468 invalid on the ground of new matter and lack of supplemental oath, and claim 10 of patent 1,957,774 invalid over the prior art, is not justified by the record and should be reversed.

Respectfully submitted,

ERROL O. SHOUR,

IRA J. WILSON,

Attorneys for Appellant.

United States
Circuit Court of Appeals

For the Ninth Circuit.

CONSOLIDATED TIMBER COMPANY,
a corporation,

Appellant,

vs.

IVAN WOMACK,

Appellee.

IVAN WOMACK,

Appellant,

vs.

CONSOLIDATED TIMBER COMPANY,
a corporation,

Appellee.

Transcript of Record

Upon Appeals from the District Court of the United
States for the District of Oregon.

FILED

MAR - 5 1942

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States for the District of Oregon.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States
for the District of Oregon

November Term, 1940.

Be it remembered, that on the 19th day of November, 1940, there was duly filed in the District Court of the United States for the District of Oregon, a Complaint, in words and figures as follows, to wit:
[1*]

In the District Court of the United States
for the District of Oregon

IVAN WOMACK,

Plaintiff,

vs.

CONSOLIDATED TIMBER COMPANY,
a corporation,

Defendant.

COMPLAINT

Comes now the plaintiff and for a first cause of action against the defendant complains and alleges:

I.

That plaintiff brings this action under and by virtue of an act of the Congress of the United States for the regulation of commerce among the states, to-wit, the Fair Labor Standards Act of 1938 (29 U. S. C. A., paragraphs 201-219, inclusive), as hereinafter more fully appears.

*Page numbering appearing at foot of page of original certified Transcript of Record.

II.

That at all times herein mentioned defendant was and now is a corporation, duly organized and existing under and by virtue of the laws of the state of Oregon, with its principal office and place of business located in the city of Portland, in said state; that during all said times defendant owned, maintained and operated, as it now does, a certain logging camp for the manufacture of timber into sawlogs, which said logging camp is, and was during all times herein mentioned, located near the town of Forest Grove in said state of Oregon; that said logs manufactured by defendant in its said logging camp, aforesaid, were during all times herein mentioned, and now are, sold and shipped by means of railroad and water transportation to various and sundry sawmills located in the state of [2] Oregon and adjacent states; that substantially all of said logs so manufactured by defendant or the lumber subsequently manufactured from said logs was at all times herein mentioned, and now is, shipped to states other than the state of Oregon, and said defendant during all said times herein mentioned was and now is engaged in commerce and in the production of goods for commerce, within the meaning of said Fair Labor Standards Act of 1938, and was and is subject to all the terms and provisions thereof.

III.

That during all times herein mentioned, and particularly subsequent to October 24, 1938, and to the

present time, said defendant owned, maintained and operated a certain cook house in its said logging camp, aforesaid, which said cook house was maintained and operated in conjunction with said defendant's logging operation; that said cook house was at all times herein mentioned, and now is, an integral, necessary and indispensable part of said logging operations of defendant, aforesaid, and is and was at all times herein mentioned integrally, necessarily and indispensably connected with defendant's production of logs in said logging camp.

IV.

That during all times herein mentioned, particularly subsequent to October 24, 1938, and to the present time, plaintiff was and is employed by said defendant as a baker in said cook house maintained by said defendant in its said logging camp aforesaid; that plaintiff's duties in said logging camp consisted and do now consist of cooking and baking for loggers and other employees employed by said defendant in said logging camp aforesaid; that plaintiff during all said times was engaged, as he now is, in commerce and in the production of goods for commerce, within the meaning of the Fair Labor Standards Act of 1938; that during all said times, [3] and for a long time prior thereto, plaintiff was and now is employed by said defendant upon a monthly basis at the regular rate of wages of \$125.00 per month, plus board and room; that said board and room during all said times was of the reason-

able and agreed value of \$45.00 per month; that plaintiff was working, therefore, during all of said times at a regular monthly wage, in the aggregate, of \$170.00 per month; that between the dates of October 30, 1938, and May 20, 1939, plaintiff was required by defendant in his said employment to work a total of 382 hours in excess of 44 hours per week, as appears more particularly in the itemized statement attached hereto, which said statement is referred to as Exhibit A and by this reference made a part of this complaint as though set forth hereat verbatim; that plaintiff received no extra wages whatsoever for said hours worked in excess of said 44 hours per week, but was compelled by said defendant, as aforesaid, to work said 44 hours per week plus said excess hours aforesaid, all for said regular monthly rate as above set forth; that plaintiff often demanded additional wages for said excess hours worked in accordance with the terms and provisions of said Fair Labor Standards Act of 1938, but said defendant wholly failed, neglected and refused to pay any such additional sums, notwithstanding the terms and provisions of said act; that by reason thereof, plaintiff is entitled to have and receive of defendant as wages, in accordance with the terms and provisions of said act aforesaid, for said excess hours worked the sum of \$129.15, as appears more particularly from said Exhibit A hereto, in which said amount defendant is indebted to plaintiff by reason of said facts aforesaid; that between August 1, 1940, and October 23, 1940, de-

fendant has compelled plaintiff to work in excess of 42 hours per week, and since October 23, 1940, plaintiff has been compelled to work in excess of 40 hours per week, and plaintiff is therefore entitled to overtime at time and [4] one-half for all work performed in excess of 42 hours per week between August 1, 1940, and October 23, 1940, and for all work performed in excess of 40 hours per week from October 24, 1940, to the present time; that plaintiff does not know the exact amount of this overtime, but such amount is in the possession of the defendant and well known to it, and plaintiff therefore asks for additional sums for these periods.

V.

That in addition to said unpaid wages of \$129.15, as hereinbefore set forth, plaintiff is entitled to receive of and from defendant, under and by virtue of the provisions of said act aforesaid, an additional amount equal to one and one-half times the plaintiff's regular rate of pay for all work performed in excess of said 44 hours per week between said dates of October 28, 1938, and May 20, 1939; that is to say, plaintiff is entitled to receive of and from defendant as liquidated damages under and by virtue of the provisions of said act an additional sum of \$387.47.

VI.

That plaintiff has been compelled to employ attorneys to prosecute his claim for wages and liqui-

dated damages, and plaintiff is therefore additionally entitled to have and receive of and from defendant a reasonable amount as attorneys' fees; that a reasonable amount to be allowed plaintiff as attorneys' fees herein is the sum of \$175.00.

For a second cause of action plaintiff alleges:

I.

Plaintiff realleges and incorporates herein paragraphs I, II and III of his first cause of action and makes the same a part hereof, as though set forth at length herein. [5]

II.

That during all times herein mentioned, and particularly subsequent to October 24, 1938, and to the present time, Robert Vandehey was and now is employed by said defendant as a dish washer in said cook house maintained by said defendant in its said logging camp aforesaid; that said Robert Vandehey was during all said times engaged, as he now is, in commerce and in the production of goods for commerce, within the meaning of the Fair Labor Standards Act of 1938; that during all said times, and for a long time prior thereto, said Robert Vandehey was and now is employed by said defendant upon a monthly basis at the regular rate of wages of \$85.00 per month, plus room and board; that said room and board during all said times was of the reasonable and agreed value of \$45.00 per month, and said Robert Vandehey was working, therefore, dur-

ing all of said times at a regular monthly wage, in the aggregate, of \$130.00 per month; that between the dates of October 30, 1938, and August 19, 1939, said Robert Vandehey was required by defendant in his said employment to work a total of 440½ hours in excess of 44 hours per week, as appears more particularly in the itemized statement attached hereto, which said statement is referred to as Exhibit B and by this reference made a part of this complaint as though set forth hereat verbatim; that Robert Vandehey received no extra wages whatsoever for said hours worked in excess of said 44 hours per week, but was compelled by said defendant, as aforesaid, to work said 44 hours per week plus said excess hours aforesaid, all for said regular monthly rate as above set forth; that said Robert Vandehey often demanded additional wages for said excess hours worked in accordance with the terms and provisions of said Fair Labor Standards Act of 1938, but said defendant wholly failed, neglected and refused to pay any such additional sums, notwithstanding the terms and provisions of [6] said act; that by reason thereof, said Robert Vandehey is entitled to have and receive of defendant as wages, in accordance with the terms and provisions of said act aforesaid, for said excess hours worked the sum of \$113.35, as appears more particularly from said Exhibit B hereto, in which said amount defendant is indebted to said Robert Vandehey by reason of said facts aforesaid; that

between August 1, 1940, and October 23, 1940, defendant has compelled said Robert Vandehey to work in excess of 42 hours per week, and since October 24, 1940, said Robert Vandehey has been compelled to work in excess of 40 hours per week, and said Robert Vandehey is therefore entitled to overtime at time and one-half for all work performed in excess of 42 hours per week between August 1, 1940, and October 23, 1940, and for all work performed in excess of 40 hours per week from October 24, 1940, to the present time; that said Robert Vandehey does not know the exact amount of this overtime, but such amount is in the possession of the defendant and well known to it, and plaintiff therefore asks for additional sums for these periods.

III.

That in addition to said unpaid wages of \$113.35, as hereinbefore set forth, said Robert Vandehey is entitled to receive of and from defendant, under and by virtue of the provisions of said act aforesaid, an additional amount equal to one and one-half times his regular rate of pay for all work performed in excess of said 44 hours per week between said dates of October 28, 1938, and May 20, 1939; that is to say, said Robert Vandehey is entitled to receive of and from defendant as liquidated damages under and by virtue of the provisions of said act an additional sum of \$340.17.

IV.

That prior to the commencement of this action, said Robert [7] Vandehey has assigned all his claims for overtime against defendant to plaintiff; that plaintiff has been designated by said Robert Vandehey as the agent and representative of said Robert Vandehey to maintain such action for and on his behalf; that said Robert Vandehey is an employee of the defendant and is similarly situated with plaintiff, as he is with all the other plaintiff's assignors.

V.

That plaintiff has been compelled to employ attorneys to prosecute this claim for wages and liquidated damages, and plaintiff is therefore additionally entitled to have and receive of and from defendant a reasonable amount as attorney's fees; that a reasonable amount to be allowed plaintiff as attorneys' fees herein is the sum of \$150.00. [8]

For a third cause of action plaintiff alleges:

I.

Plaintiff realleges and incorporates herein paragraphs I, II and III of his first cause of action and makes the same a part hereof, as though set forth at length herein.

II.

That during all times herein mentioned, and particularly subsequent to October 24, 1938, and to the present time, Marion B. Vandehey was and now is

employed by said defendant as a dish washer in said cook house maintained by said defendant in its said logging camp aforesaid; that said Marion B. Vandehey was during all said times engaged, as he now is, in commerce and in the production of goods for commerce, within the meaning of said Fair Labor Standards Act of 1938; that during all said times, and for a long time prior thereto, said Marion B. Vandehey was and now is employed by said defendant upon a monthly basis at the regular rate of wages of \$85.00 per month, plus room and board; that said room and board during all said times was of the reasonable and agreed value of \$45.00 per month, and said Marion B. Vandehey was working, therefore, during all of said times at a regular monthly wage, in the aggregate, of \$130.00 per month; that between the dates of October 30, 1938, and May 26, 1939, said Marion B. Vandehey was required by defendant in his said employment to work a total of 62 hours in excess of 44 hours per week, as appears more particularly in the itemized statement attached hereto, which said statement is referred to as Exhibit C and by this reference made a part of this complaint as though set forth hereat verbatim; that said Marion B. Vandehey received no extra wages whatsoever for said hours worked in excess of said 44 hours per week, but was compelled by said [9] defendant, as aforesaid, to work said 44 hours per week plus said excess hours aforesaid, all for said regular monthly

rate as above set forth; that said Marion B. Vandehey often demanded additional wages for said excess hours worked in accordance with the terms and provisions of said Fair Labor Standards Act of 1938, but said defendant wholly failed, neglected and refused to pay any such additional sums, notwithstanding the terms and provisions of said act; that by reason thereof, said Marion B. Vandehey is entitled to have and receive of defendant as wages, in accordance with the terms and provisions of said act aforesaid, for said excess hours worked the sum of \$20.40, as appears more particularly from said Exhibit C hereto, in which said amount defendant is indebted to said Marion B. Vandehey by reason of said facts aforesaid; that between August 1, 1940, and October 23, 1940, defendant has compelled said Marion B. Vandehey to work in excess of 42 hours per week, and since October 24, 1940, said Marion B. Vandehey has been compelled to work in excess of 40 hours per week, and said Marion B. Vandehey is therefore entitled to overtime at time and one-half for all work performed in excess of 42 hours per week between August 1, 1940, and October 23, 1940, and for all work performed in excess of 40 hours per week from October 24, 1940, to the present time; that said Marion B. Vandehey does not know the exact amount of this overtime, but such amount is in the possession of the defendant and well known to it, and plaintiff therefore asks for additional sums for these periods.

III.

That in addition to said unpaid wages of \$20.40, as hereinbefore set forth, said Marion B. Vandehey is entitled to receive of and from defendant, under and by virtue of the provisions of said act aforesaid, an additional amount equal to one and one-half [10] times his regular rate of pay for all work performed in excess of said 44 hours per week between said dates of October 28, 1938, and May 20, 1939; that is to say, said Marion B. Vandehey is entitled to receive of and from defendant as liquidated damages under and by virtue of the provisions of said act an additional sum of \$61.22.

IV.

That prior to the commencement of this action, said Marion B. Vandehey has assigned all his claims for overtime against defendant to plaintiff; that plaintiff has been designated by said Marion B. Vandehey as the agent and representative of said Marion B. Vandehey to maintain such action for and on his behalf; that said Marion B. Vandehey is an employee of the defendant and is similarly situated with plaintiff, as he is with all the other of plaintiff's assignors.

V.

That plaintiff has been compelled to employ attorneys to prosecute this claim for wages and liquidated damages, and plaintiff is therefore additionally entitled to have and receive of and from defendant a

reasonable amount as attorneys' fees; that a reasonable amount to be allowed plaintiff as attorneys' fees herein is the sum of \$25.00.

For a fourth cause of action plaintiff alleges:

I.

Plaintiff realleges and incorporates herein paragraphs I, II and III of his first cause of action and makes the same a part hereof, as though set forth at length herein.

II.

That during all times herein mentioned, and particularly subsequent to October 24, 1938, and to the present time, Floyd [11] Calloway was and now is employed by said defendant as a kitchen helper in said cook house maintained by said defendant in its said logging camp aforesaid; that said Floyd Calloway was during all said times engaged, as he now is, in commerce and in the production of goods for commerce, within the meaning of said Fair Labor Standards Act of 1938; that during all said times, and for a long time prior thereto, said Floyd Calloway was and now is employed by said defendant upon a monthly basis at the regular rate of wages of \$85.00 per month, plus room and board; that said room and board during all said times was of the reasonable and agreed value of \$45.00 per month, and said Floyd Calloway was working, therefore, during all of said times at a regular monthly wage, in the aggregate, of \$130.00 per month; that

between the dates of October 30, 1938, and May 20, 1939, said Floyd Calloway was required by defendant in his said employment to work a total of 228 hours in excess of 44 hours per week, as appears more particularly in the itemized statement attached hereto, which said statement is referred to as Exhibit D and by this reference made a part of this complaint as though set forth hereat verbatim; that said Floyd Calloway received no extra wages whatsoever for said hours worked in excess of said 44 hours per week, but was compelled by said defendant, as aforesaid, to work said 44 hours per week plus said excess hours aforesaid, all for said regular monthly rate as above set forth; that said Floyd Calloway often demanded additional wages for said excess hours worked in accordance with the terms and provisions of said Fair Labor Standards Act of 1938, but said defendant wholly failed, neglected and refused to pay any such additional sums, notwithstanding the terms and provisions of said act; that by reason thereof, said Floyd Calloway is entitled to have and receive of defendant as wages, in accordance with the terms [12] and provisions of said act aforesaid, for said excess hours worked the sum of \$57.65, as appears more particularly from said Exhibit D hereto, in which said amount defendant is indebted to said Floyd Calloway by reason of said facts aforesaid; that between August 1, 1940, and October 23, 1940, defendant has compelled said Floyd Calloway to work in excess of 42

hours per week, and since October 24, 1940, said Floyd Calloway has been compelled to work in excess of 40 hours per week, and said Floyd Calloway is therefore entitled to overtime at time and one-half for all work performed in excess of 42 hours per week between August 1, 1940, and October 23, 1940, and for all work performed in excess of 40 hours per week from October 24, 1940, to the present time; that said Floyd Calloway does not know the exact amount of this overtime, but such amount is in the possession of the defendant and well known to it, and plaintiff therefore asks for additional sums for these periods.

III.

That in addition to said unpaid wages of \$57.65, as hereinbefore set forth, said Floyd Calloway is entitled to receive of and from defendant, under and by virtue of the provisions of said act aforesaid, an additional amount equal to one and one-half times his regular rate of pay for all work performed in excess of said 44 hours per week between said dates of October 28, 1938, and May 20, 1939; that is to say, said Floyd Calloway is entitled to receive of and from defendant as liquidated damages under and by virtue of the provisions of said act an additional sum of \$173.06.

IV.

That prior to the commencement of this action, said Floyd Calloway has assigned all his claims for

overtime against defendant to plaintiff; that plaintiff has been designated by said Floyd Calloway as the agent and representative of said Floyd Calloway to maintain [13] such action for and on his behalf; that said Floyd Calloway is an employee of the defendant and is similarly situated with plaintiff, as he is with all the other of plaintiff's assignors.

V.

That plaintiff has been compelled to employ attorneys to prosecute this claim for wages and liquidated damages, and plaintiff is therefore additionally entitled to have and receive of and from defendant a reasonable amount as attorneys' fees; that a reasonable amount to be allowed plaintiff as attorneys' fees herein is the sum of \$85.00. [14]

For a fifth cause of action plaintiff alleges:

I.

Plaintiff realleges and incorporates herein paragraphs I, II and III of his first cause of action and makes the same a part hereof, as though set forth at length herein.

II.

That during all times herein mentioned, and particularly subsequent to October 24, 1938, and to the present time, Charles Chapman was and now is employed by said defendant as second cook in said cook house maintained by said defendant in its said logging camp aforesaid; that said Charles Chap-

man was during all said times engaged, as he now is, in commerce and in the production of goods for commerce, within the meaning of said Fair Labor Standards Act of 1938; that during all said times, and for a long time prior thereto, said Charles Chapman was and now is employed by said defendant upon a monthly basis at the regular rate of wages of \$125.00 per month, plus room and board; that said room and board during all said times was of the reasonable and agreed value of \$45.00 per month, and said Charles Chapman was working, therefore, during all of said times at a regular monthly wage, in the aggregate of \$170.00 per month; that between the dates of October 30, 1938, and June 10, 1939, said Charles Chapman was required by defendant in his said employment to work a total of 460 hours in excess of 44 hours per week, as appears more particularly in the itemized statement attached hereto, which said statement is referred to as Exhibit E and by this reference made a part of this complaint as though set forth hereat verbatim; that said Charles Chapman received no extra wages whatsoever for said hours worked in excess of said 44 hours per week, but was compelled by said defendant, as aforesaid, to [15] work said 44 hours per week plus said excess hours aforesaid, all for said regular monthly rate as above set forth; that said Charles Chapman often demanded additional wages for said excess hours worked in accordance with the terms and provisions of said Fair

Labor Standards Act of 1938, but said defendant wholly failed, neglected and refused to pay **any** such additional sums, notwithstanding the terms and provisions of said act; that by reason thereof, said Charles Chapman is entitled to have and receive of defendant as wages, in accordance with the terms and provisions of said act aforesaid, for said excess hours worked the sum of \$163.78, as appears more particularly from said Exhibit E hereto, in which said amount defendant is indebted to said Charles Chapman by reason of said facts aforesaid; that between August 1, 1940, and October 23, 1940, defendant has compelled said Charles Chapman to work in excess of 42 hours per week, and since October 24, 1940, said Charles Chapman has been compelled to work in excess of 40 hours per week, and said Charles Chapman is therefore entitled to overtime at time and one-half for all work performed in excess of 42 hours per week between August 1, 1940, and October 23, 1940, and for all work performed in excess of 40 hours per week from October 24, 1940, to the present time; that **said** Charles Chapman does not know the exact amount of this overtime, but such amount is in the possession of the defendant and well known to it, and plaintiff therefore asks for additional sums for these periods.

III.

That in addition to said unpaid wages of \$163.78, as hereinbefore set forth, said Charles Chapman is

entitled to receive of and from defendant, under and by virtue of the provisions of said act aforesaid, an additional amount equal to [16] one and one-half times his regular rate of pay for all work performed in excess of said 44 hours per week between dates of October 28, 1938, and May 20, 1939; that is to say, said Charles Chapman is entitled to receive of and from defendant as liquidated damages under and by virtue of the provisions of said act an additional sum of \$491.42.

IV.

That prior to the commencement of this action, said Charles Chapman has assigned all his claims for overtime against defendant to plaintiff; that plaintiff has been designated by said Charles Chapman as the agent and representative of said Charles Chapman to maintain such action for and on his behalf; that said Charles Chapman is an employee of the defendant and is similarly situated with plaintiff, as he is with all the other of plaintiff's assignors.

V.

That plaintiff has been compelled to employ attorneys to prosecute this claim for wages and liquidated damages, and plaintiff is therefore additionally entitled to have and receive of and from defendant a reasonable amount as attorneys' fees; that a reasonable amount to be allowed plaintiff as attorneys' fees herein is the sum of \$225.00. [17]

Wherefore, plaintiff prays for judgment against the defendant on his first cause of action in the sums of One Hundred Twenty-nine and 15/100 (\$129.15) Dollars and Three Hundred Eighty-seven and 47/100 (\$387.47) Dollars, liquidated damages, and One Hundred Seventy-five (\$175.00) Dollars, attorneys' fees; on his second cause of action in the sums of One Hundred Thirteen and 35/100 (\$113.35) Dollars and Three Hundred Forty and 17/100 (\$340.17) Dollars, liquidated damages, and One Hundred Fifty (\$150.00) Dollars, attorneys' fees; on his third cause of action in the sums of Twenty and 40/100 (\$20.40) Dollars and Sixty-one and 22/100 (\$61.22) Dollars, liquidated damages, and Twenty-five (\$25.00) Dollars, attorneys' fees; on his fourth cause of action in the sums of Fifty-seven and 65/100 (\$57.65) Dollars and One Hundred Seventy-three and 06/100 (\$173.06) Dollars, liquidated damages, and Eighty-five (\$85.00) Dollars, attorneys' fees; on his fifth cause of action in the sums of One Hundred Sixty-three and 78/100 (\$163.78) Dollars and Four Hundred Ninety-one and 42/100 (\$491.42) Dollars, liquidated damages, and Two Hundred Twenty-five (\$225.00) Dollars, attorneys' fees; and for his costs and disbursements incurred herein.

GREEN, BOESEN & LANDYE

Attorneys for Plaintiff.

State of Oregon

County of Multnomah—ss.

I, Ivan G. Womack, being first duly sworn, depose and say that I am the plaintiff in the above entitled cause; and that the foregoing complaint is true as I verily believe.

IVAN G. WOMACK

Subscribed and sworn to before me this 9th day of November, 1940.

(Seal) JAMES LANDYE

My Commission expires December 15, 1943.

[Endorsed]: Filed November 12, 1940. G. H. Marsh, Clerk. By F. L. Buck, Chief Deputy. [18]

And afterwards, to wit, on the 5th day of December, 1940, there was duly filed in said Court, an answer in words and figures as follows, to wit: [19]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant above named and for answer to the plaintiff's first cause of action admits, denies and alleges as follows:

I.

Defendant admits the allegations of paragraph I of the first cause of action, that this is an action brought under and by virtue of an act of Congress.

II.

In answer to paragraph II of plaintiff's first cause of action, defendant admits and alleges that at all times mentioned in the complaint defendant was and is a corporation organized and existing under and by virtue of the laws of the State of Michigan and qualified to do business in the State of Oregon engaged in the business of logging, operating and maintaining a logging camp in the State of Oregon, located near Forest Grove, Oregon; that the logs cut by defendant from property owned or logged by defendant in the course of its business are sold entirely within, and are delivered to the purchasers thereof within, the State of Oregon; that most of the logs are ultimately sawed into lumber by the purchasers thereof in mills located within the State of Oregon, a sub- [20] stantial percentage of which lumber moves ultimately in interstate commerce to points outside the State of Oregon. Except as above admitted, defendant denies all of the allegations contained in paragraph II of the first cause of action.

III.

In answer to paragraph III of plaintiff's first cause of action, defendant admits and alleges that at all times mentioned in plaintiff's complaint up to and including June 28, 1940, it owned, maintained and operated a cookhouse located at Glenwood, Oregon; that said cookhouse was operated as a restaurant for the use and benefit of defendant's employees

and of others not employed by defendant; that said cookhouse or restaurant was maintained and operated in a separate building, no part of which was used by the defendant in the production of logs; that in addition to defendant's cookhouse or restaurant there were other facilities in or about Glenwood, Oregon, for securing food, available to defendant's employees and others; that after June 10, 1940, defendant opened and has since operated a cookhouse at a point known as Camp Two, located approximately 17 miles from Glenwood; that said cookhouse is maintained and operated by the defendant in a separate building, no part of which is used by the defendant in the production of logs; that since said cookhouse has been removed to Camp Two, it is practically the only facility for employees and others to obtain food at Camp Two; that defendant does not require its employees to use the facilities of said cookhouse; that some of defendant's employees commute to and from their work and do not make use of said cookhouse; that at all times mentioned in the complaint, said cookhouses were owned, maintained and operated by defendant as separate establishments and not as parts of defendant's [21] principal business of logging; that defendant does not require its employees to make use of said facilities; that defendant's employees engaged in the cutting of logs from standing timber and transporting said logs from the woods to the point where said logs are sold to customers are paid

wages at fixed rates and that such employees as do make use of defendant's cookhouse or restaurant facilities pay for the food sold and service rendered to them by said cookhouse or restaurant at agreed rates per meal; and that the food and services available through the said cookhouses or restaurants are purchased in small quantities by defendant's employees and others for their private consumption and use and are in no sense for industrial or business purposes. Except as above admitted, defendant denies all of the allegations of paragraph III of the first cause of action.

IV.

In answer to paragraph IV of plaintiff's first cause of action, defendant admits and alleges that since October 24, 1938, and to the present time, plaintiff was and now is employed by the defendant in said cookhouse or restaurant as a baker, engaged in preparing food for sale to defendant's employees and others; and that said food was prepared and sold to such persons for consumption. Defendant denies that at any time mentioned in plaintiff's complaint plaintiff has been engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938 (52 Statutes at Large 1060, 29 U. S. C. A. Sections 201-219). Defendant admits that plaintiff has been and now is employed at an agreed monthly salary of \$125.00 per month, plus board and room. Defendant admits that the plaintiff has in some weeks worked in excess of 44 hours, 42 hours or 40 hours, respectively,

as alleged [22] in plaintiff's complaint, but defendant has no knowledge upon which to form a belief as to the exact number of hours worked and, therefore, denies that plaintiff has worked the number of hours as alleged in his complaint and set forth in Exhibit A. Defendant denies that plaintiff's employment is governed by the said Fair Labor Standards Act of 1938, but alleges that if such employment is within said Act, said employment is specifically exempted by Section 13 a (2) of the said Act which provides that "Section 6 and 7 (the minimum wage and maximum hour provisions) shall not apply with respect to . . . (a) any employee engaged in any retail or service establishment, the greater part of whose selling or servicing is in intrastate commerce," in that plaintiff's employment as a baker in defendant's cookhouse or restaurant is employment in a "retail or service establishment," all of the selling or servicing therein being in intrastate commerce, as the food prepared by plaintiff is sold and served to ultimate consumers solely within the State of Oregon. Except as above admitted, defendant denies each and every allegation in paragraph IV of plaintiff's complaint.

V.

In answer to paragraphs V and VI of plaintiff's first cause of action, defendant denies each and every allegation therein contained.

For answer to the second cause of action set forth in plaintiff's complaint, defendant admits that Rob-

ert Vandehey was and now is employed by defendant as a dishwasher in defendant's cookhouse or restaurant; that said Robert Vandehey was paid by defendant upon a monthly basis at the regular rate of \$85.00 per month, plus room and board, and that Robert [23] Vandehay has assigned his claim, as set forth in said second cause of action, to plaintiff. Except as so admitted and except as admitted and alleged in the answer to the first cause of action, defendant denies all of the allegations set forth in the second cause of action.

For answer to the third cause of action set forth in plaintiff's complaint, defendant admits that Marion B. Vandehey was and now is employed by defendant as dishwasher in defendant's cookhouse or restaurant; that said Marion B. Vandehey was paid by defendant upon a monthly basis at the regular rate of \$85.00 per month, plus room and board, and that Marion B. Vandehey has assigned his claim, as set forth in said third cause of action, to plaintiff. Except as so admitted and except as admitted and alleged in the answer to the first cause of action, defendant denies all of the allegations set forth in the third cause of action.

For answer to the fourth cause of action set forth in plaintiff's complaint, defendant admits that Floyd Calloway was and now is employed by defendant as a kitchen helper in defendant's cookhouse or restaurant; that said Floyd Calloway was paid by defendant upon a monthly basis at the reg-

ular rate of \$85.00 per month, plus room and board, and that said Floyd Calloway has assigned his claim, as set forth in said fourth cause of action, to plaintiff. Except as so admitted and except as admitted and alleged in the answer to the first cause of action, defendant denies all of the allegations set forth in the fourth cause of action. [24]

For answer to the fifth cause of action set forth in plaintiff's complaint, defendant admits that Charles Chapman was and now is employed by defendant as a second cook in defendant's cookhouse or restaurant; that said Charles Chapman was paid by defendant upon a monthly basis at the regular rate of \$125.00 per month, plus room and board, and that said Charles Chapman has assigned his claim, as set forth in said fifth cause of action, to plaintiff. Except as so admitted and except as admitted and alleged in the answer to the first cause of action, defendant denies all of the allegations set forth in the fifth cause of action.

Wherefore, having fully answered the complaint of plaintiff, defendant prays that the complaint be dismissed and that it recover of and from plaintiff its costs and disbursements herein incurred.

CAREY, HART, SPENCER
& McCULLOUGH

PHILIP CHIPMAN and
ROBERT W. MAXWELL
Attorneys for Defendant.

State of Oregon

County of Multnomah—ss.

Due service of the within Answer is hereby accepted in Multnomah County, this 5th day of December, 1940, by receiving a copy thereof, duly certified to as such by Philip Chipman, of Attorneys for Defendant.

GREEN, BOESEN & LANDYE

Attorney for Plaintiff.

[Endorsed]: Filed December 5, 1940. G. H. Marsh, Clerk. By F. L. Buck, Chief Deputy. [25]

And afterwards, to wit, on Wednesday, the 9th day of April, 1941, the same being the 33rd Judicial day of the Regular March, 1941, Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

[26]

[Title of District Court and Cause.]

PRE-TRIAL ORDER

This cause came on regularly for pre-trial before the Honorable James Alger Fee, District Judge, on April 7, 1941. Plaintiff was represented by Mr. James Landye, one of his attorneys, and defendant was represented by Mr. Robert W. Maxwell, of Seattle, Washington, and Mr. Philip Chipman, of its attorneys.

Based upon the proceedings had at said pre-trial hearing, it is

Ordered that the following matters are admitted as to the issues framed by the complaint herein and the answer to the complaint:

I.

This is an action brought under and by virtue of an Act of Congress by the United States for the regulation of commerce among the states, to wit, the Fair Labor Standards Act of 1938 (29 U. S. C. A., paragraphs 201-219 inclusive).

II.

The complaint contains five causes of action for wages alleged to be due plaintiff and four assignors of plaintiff from [27] defendant. The claims of the four assignors of plaintiff have been duly and properly assigned by said assignors to plaintiff.

III.

The parties have entered into the following stipulation of facts which have been agreed to be the facts on which this action is based:

“The parties hereto, represented by their respective attorneys, hereby enter into the following stipulation of facts:

I.

Defendant, Consolidated Timber Company, is a corporation organized and existing under the laws of the State of Michigan, qualified to do business in the State of Oregon. It owns timber-

lands and is engaged in the business of logging in Washington and Tillamook Counties, Oregon, with headquarters at Glenwood, Washington County. Defendant employs a logging crew, which is engaged in falling and bucking timber and loading it, on cars, and operates a logging railroad which connects with a common carrier railroad. Defendant also has certain contracts with independent contractors who log parts of its timber and deliver logs to defendant at specified points, where defendant transports them by railroad to the common carrier railroad. A small percentage of the logs cut and produced by defendant is sold locally to mills located in Washington County, Oregon, and is there manufactured into timber. By far the larger proportion of the logs produced by defendant is, however, transported by common carrier railroads to a point on the Willamette Slough in Multnomah County, Oregon, where the logs are dumped into the water and rafted. Defendant sells the rafts of logs to various saw-mills, about 80 per cent of them going to saw-mills in Oregon and about 20 per cent to saw-mills in Washington. All sales are made and completed entirely within the State of Oregon and the purchasers send tugboats to pick up the rafts of logs which they have purchased and transport them to their mills wherever located. The logs are then manufactured into lumber by the purchaser mills and in each instance at

least 70 per cent of the lumber manufactured from said logs moves in interstate commerce.

II.

Between October 24, 1938, and June 28, 1940, defendant operated what is known in logging parlance as a cookhouse at Glenwood, Oregon. The cookhouse consisted of a kitchen and dining room in a building separate and apart from the other buildings of defendant. Defendant's employees were permitted, but not required, to use the facilities of the cookhouse. Meals were then sold to them at fixed rates of 45 cents per meal for employees and 50 cents per meal for strangers. Those employees who used the facilities of the cookhouse had deducted from their [28] wages the cost of the meals taken by them. Strangers paid for their meals in cash. Said cookhouse in Glenwood, Oregon, was used not only by employees of defendant, but also by employees of logging companies under contract with defendant, employees of some independent businesses operated at Glenwood, and others. Many of defendant's employees lived in Glenwood and ate at home. The greater proportion of defendant's employees did not use the facilities of the cookhouse. For example, during a typical month in which defendant employed 302 persons, 217 men regularly used defendant's cookhouse. Of these, 110 were employees of defendant (including 18 cookhouse em-

ployees), 101 were employees of logging companies under contract with defendant, and 6 were employees of independent businesses operated at Glenwood; 192 employees of defendant did not use the cookhouse facilities. During the same typical month, 302 meals were served to strangers.

III.

Subsequent to June 10, 1940, defendant opened and has since operated a cookhouse at a point known as Camp 2 located approximately 17 miles southwest of Glenwood. This cookhouse consists of a kitchen and dining room in a building separate and apart from other buildings of defendant. The facilities of this cookhouse are used by substantially all of defendant's employees at Camp 2, as it is the only practicable facility for eating at Camp 2. No employee, however, is required to eat there, and some employees occasionally go back to Glenwood, 17 miles away, for their meals, though this is rarely done. The said cookhouse is also used by employees of contractors of defendant and by the few members of the public who come to Camp 2. Meals are paid for at the same rates and in the same manner as was done at Glenwood.

IV.

At all times herein mentioned, defendant's operations were subject to a collective bargain-

ing agreement between Columbia Basin Loggers, an employers' organization of which defendant was a member, and Columbia River District Council No. 5, Lumber and Sawmill Workers' Union, affiliated with International Woodworkers of America (C. I. O.), of which substantially all of defendant's employees were members. By the provisions of said working agreements, one dated May 22, 1937, and the other dated September 10, 1940, it was provided, among other things:

‘Article XV

Cook House Operation on Basis of Cost:

Employer-operated cook houses shall be conducted upon the basis of cost, it being the purpose hereof that such cook houses shall be self-sustaining but shall not earn a profit. Price of meals charged employees in such cook houses shall be based upon the principle here announced, and such price in each operation shall be settled by negotiation between the Employer and the Plant Committee.”

[29]

V.

Plaintiff, and the assignors of plaintiff, in the second to fifth causes of action, are and have been employed in both of defendant's cook-houses, plaintiff as a baker and plaintiff's assignors as dishwashers, kitchen helpers and second cook. Their duties consisted of pre-

paring food and operating the kitchen. The food is served to and sold to defendant's employees and others who use the cookhouse at the rates hereinbefore set out. Plaintiff and plaintiff's assignors had been paid by defendant a fixed monthly wage for a 26-day month. Substantially all other employees of defendant are paid by the hour. Plaintiff and plaintiff's assignors perform no services for defendant other than in said cookhouse.

VI.

Defendant employs from 275 to 315 employees. All of defendant's employees (other than salaried employees) engaged in its logging operations are employed on a 40-hour week, and have been at all times since October 24, 1938, and all of said employees are paid time and one-half for all time in excess of 40 hours per week. Defendant, however, employs a limited number of employees on a monthly basis at an agreed monthly wage, including plaintiff and the assignors of plaintiff. The cookhouses in which plaintiff and plaintiff's assignors are employed are customarily operated seven days per week, although the logging operations are carried on only five days per week, for the reason that some of those using the cookhouse desire to have its accommodations available even when the logging operations are not running (the

cookhouse being operated by a skeleton crew when operations are down).

VII.

The enforcement policy adopted by the Administrator of the Fair Labor Standards Act is that cookhouse employees are exempt under the provisions of the Act, as shown by the letter from Philip B. Fleming, dated August 8, 1940, to National Lumber Manufacturers Association, of which the following is a copy:

‘U. S. Department of Labor
Wage and Hour Division
Washington

August 8, 1940

Office of the
Administrator
National Lumber Manufacturers Association
1337 Connecticut Avenue
Washington, D. C.

Gentlemen:

This will confirm the verbal opinion given you on the telephone by Mr. Reel on August 6, 1940, that cook house employees in lumber camps are entitled to the exemption provided for service establishments [30] under Section 13 (a) (2) of the Fair Labor Standards Act, a copy of which is enclosed.

Of course, cook house employees who are also engaged in nonexempt work under the

act would be entitled to the benefits of the act for any week during which they perform such nonexempt work.

Sincerely yours,

(Signed) PHILIP B. FLEMING

Enclosure

Administrator.'

and as shown by the following correspondence:

1. Letter from Columbia River District Council No. 5 to Regional Director of the Wage and Hour Division, dated August 8, 1940:

'August 8, 1940

Mr. W. O. Ash, Director
Wages and Hours Division
United States Department of Labor
Humboldt Bank Building
San Francisco, California

Dear Mr. Ash:

We are indirectly advised that the Administrator of the Wages and Hours Law has recently issued a decision declaring those employed in the cookhouses of logging camps to be exempt from regulations of the Wages and Hours Law. We are not acquainted with the text of such decision.

It was our understanding from personal conference with representatives of the Wages and Hours division as well as various bulletins and communications we have received

therefrom, but we would be notified of any hearing on a matter concerning the wood-working industry and invited to offer our opinions thereon. The decision on logging camp cookhouse crews, if it is as far reaching as we are informed, is of very serious concern to ourselves as a large body of organized workers in the woodworking industry. We dislike and object to being denied the opportunity to be heard on these matters.

The employers have readily grasped this decision on the cookhouse crews and within the past few weeks have ordered an extension of hours of work for the workers directly concerned. This will very likely result in strike. Our organization is prepared to fight with every economic and legal resource at our command to protect the thousands of workers concerned by this decision.

As stated above, we have not had the courtesy of [31] any information whatsoever on this important decision. We have immediately before us cases growing out of same that are very apt to result in strike action to protect our people against its imposition by the employers. We are now preparing for the necessary legal approach to the problem generally. Our attorneys and ourselves are handicapped by the surprising lack of information surrounding this decision. May we there-

fore request that twelve copies of same be forwarded to this office at our expense?

Assuring you of our sincere desire to co-operate with you and any agencies of the Wage and Hour Division and hoping that your cooperation may be had, we remain

Very truly yours,

INTERNATIONAL WOOD-
WORKERS OF AMERICA
COLUMBIA RIVER DISTRICT
COUNCIL #5

By DON HELMICK,
District Representative'

2. Letter from the Regional Director of the Wage and Hour Division to Columbia River District Council No. 5, dated August 16, 1940:

'U. S. Department of Labor
Wage and Hour Division

August 16, 1940

San Francisco, California

Mr. Don Helmick

District Representative

Columbia River District Council No. 5

710 S. E. Grand Avenue

Portland, Oregon

Dear Mr. Helmick:

Your letter of August 8 was received during my absence from town and I hasten to write concerning the "cookhouse worker in-

terpretation'' recently sent out by the Administrator to govern inspectors in their checking of lumber firms.

My instructions from the Administrator in form of a telegram dated June 20, 1940, simply advised that I forward instructions to our inspectors to treat cookhouse employees as not covered by the Act. As you will recall our inspection force throughout the country for the past sixty days have been working in the lumber industry and it was necessary that our inspectors to know whether or not such employees were covered by the Act. I advised Mr. Pritchett while in Seattle about the nature of the interpretation and made it clear to him that Congress did not give the Administrator authority as was given to the NRA Administrator—to make decision of a binding [32] nature. In other words, whatever interpretations the Administrator gives are in the nature of an advisory opinion subject at all times to court interpretation. As I told Mr. Pritchett, I feel sure the Administrator would not at all be adverse to a court test of the question of cookhouse employees and my understanding through C. H. Elrey, our Portland representative, was that you intended to take such action.

To my knowledge there has been no formal written opinion or bulletin on the subject of bull cooks any more than there has been formal bulletin on hundreds of other interpreta-

tions that have been given by the Administrator to govern our policy in the course of our investigations.

I feel sure, however, that the Administrator is merely following the line of reasoning contained in Paragraph 19 of Interpretative Bulletin No. 6 wherein it is stated that cafeterias and supply stores operated as separate establishments by manufacturing concerns are to be considered service establishments.

If there is any further information I can give you, please feel free to write. In the meantime, I am asking Mr. Elrey to hold himself available if you wish to discuss the matter with him as our Portland representative.

With kindest regards,

WESLEY O. ASH

Regional Director'

3. Letter from Robert W. Maxwell, representing logging employers, to the Administrator of the Wage and Hour Division, dated August 1, 1940:

'August 1, 1940

Colonel Philip B. Fleming
Administrator, Wage Hour Division
United States Department of Labor
Washington, D. C.

Dear Colonel Fleming:

Recently Mr. Wesley O. Ash, Regional Director in San Francisco, was in Seattle and

I had the pleasure of meeting with him and Mr. Dille of your Seattle office.

At that time Mr. Ash stated to me that the Wage Hour Division had issued instructions through their Regional Offices to field investigators that lumber [33] camp cookhouse employees are not considered as covered by the Wage Hour Law. It is my understanding from this discussion that this ruling represents the enforcement policy of the Division.

You will probably recall that I, as attorney for the lumbering and logging industry in the Pacific Northwest, submitted a brief on the question of coverage of cookhouse employees. In April I discussed this problem with you and Mr. Denbo of your legal staff and after my return received a letter stating that the problem was being given further consideration and that I would be advised of the ultimate decision.

In order that I may have my file complete, I would very much appreciate receiving from your office a confirmation of the ruling that cookhouse employees are not considered as covered by the Wage Hour Law.

I very much appreciate the privilege accorded me to discuss with you and members of your staff some of the questions which have arisen in the practical application of the law to the lumbering and logging industry, particularly of the Pacific Northwest.

May I again, as an attorney representing employers in this area, repeat my offer of continued cooperation and a willingness to discuss with the Administration these practical problems as they arise.

Yours very truly,

RWM:s

R. W. MAXWELL'

4. Letter from the Assistant Solicitor of the Department of Labor to Mr. Robert W. Maxwell, dated August 10, 1940:

‘Department of Labor
Office of the Solicitor
Washington

August 10, 1940

In Reply Refer to:
LE:FR:MAG

Robert W. Maxwell, Esquire
354 Stuart Building
Seattle, Washington

Dear Mr. Maxwell:

Colonel Fleming has asked me to answer your letter of August 1, 1940, in which you inquire about the applicability of the Fair Labor Standards Act of 1938 to lumber camp cook house employees.

It is the view of the Wage and Hour Division that such employees come within the exemption provided in Section 13 (a) (2) of

the act for employees [34] of service establishments.

Of course, any such employees who during any workweek engage in activities which are not exempt from the act are entitled to the benefits of the act for the entire workweek.

Very truly yours,

RUFUS G. POOLE

Assistant Solicitor

In Charge of Opinions and
Review.' "

Enclosure

IV.

The hours worked by plaintiff and the assignors of plaintiff are as shown in Exhibits 7, 8, 9, 10, and 11.

V.

The regular monthly compensation of plaintiff, Ivan Womack, was \$125.00; the regular monthly compensation of Robert Vandehey was \$85.00; the regular monthly compensation of Marion B. Vandehey was \$85.00; the regular monthly compensation of Floyd Calloway was \$85.00; and the regular monthly compensation of Charles Chapman was \$125.00, except that in each instance an additional sum of 40¢ per day was paid, effective December 1, 1940. In addition to their regular monthly salaries, plaintiff and the assignors of plaintiff were allowed board and room in the reasonable values shown on Exhibits 1, 2, 3, 4, and 5, which are agreed to be correct.

VI.

It is agreed that if plaintiff is entitled to recover an attorneys' fee hereunder, the sum of \$500.00 is a reasonable fee for the services of plaintiff's attorneys.

VII.

Amendment by consent of parties 4/9/41

It is agreed that, if plaintiff is entitled to recover for overtime claimed due, plaintiff is also entitled to recover double said amount as liquidated damages, in accordance with section 16 (b) of the Wage and Hour Act.

It is further ordered that the contested issues to be submitted to the court for determination in connection with the [35] issues framed by this pre-trial order are as follows:

I.

Plaintiff contends that plaintiff and the assignors of plaintiff are covered by the provisions of the Fair Labor Standards Act of 1938, and particularly by Section 7-(a) thereof.

Defendant contends that plaintiff and the assignors of plaintiff are not covered by the Fair Labor Standards Act of 1938 and are specifically exempt from the provisions of Section 7-(a) of the Fair Labor Standards Act of 1938 by Section 13 of the Fair Labor Standards Act of 1938.

This issue involves a mixed question of law and

fact to be determined upon the trial. The parties will supplement the stipulation of facts by some explanatory testimony.

II.

If it be held that plaintiff and the assignors of plaintiff are covered by the provisions of the Fair Labor Standards Act of 1938, the following issues are submitted with respect to the computation of overtime due, if any, to plaintiff and to the assignors of plaintiff.

1. In addition to their monthly compensation plaintiff and the assignors of plaintiff were allowed board and room in the reasonable values shown in Exhibits 1, 2, 3, 4, and 5. Plaintiff contends that for the purposes of computation of overtime the monthly compensation of plaintiff and the assignors of plaintiff should be their regular monthly salary plus the reasonable value of board and room. The defendant contends that for the purposes of computation of overtime only the regular monthly salary of plaintiff and the assignors of plaintiff should be used.

By way of illustration, plaintiff contends that the [36] regular monthly salary of plaintiff, Ivan Womack, for the month of October, 1938, was \$125.00, plus \$35.10, or a total of \$160.10. Defendant contends that the monthly salary of plaintiff, Ivan Womack, for October, 1938, was \$125.00.

2. Plaintiff contends that in the first instance the overtime due plaintiff and the assignors of plain-

tiff from defendant should be computed by the following method of computation:

The monthly compensation of plaintiff and the assignors of plaintiff should be multiplied by twelve and then divided by fifty-two to obtain the weekly compensation. The weekly compensation thus resulting should be divided by forty-four for the year ending October 28, 1939, by forty-two for the year ending October 28, 1940, and by forty for all work subsequent to October 28, 1940, in order to determine the hourly compensation. Plaintiff and the assignors of plaintiff would have due them under this method of computation one and one-half times the hourly compensation for each hour worked in excess of forty-four hours per week during the year ending October 28, 1939, forty-two hours per week during the year ending October 28, 1940, and forty hours per week subsequent to October 28, 1940.

To illustrate this method of computation there is appended the following examples taken from Exhibit A attached to the complaint for the week ending November 4, 1938, worked by plaintiff, Ivan Womack. Ivan Womack's regular rate of wages was \$125.00 per month. For said month of November, 1938, the reasonable value of the board and room given to said plaintiff, Ivan Womack, was \$33.75. Therefore, according to plaintiff's contention, as shown in paragraph 1 hereof, his monthly compensation was \$158.75. The method of computation is as follows: [37]

Example A. On assumed monthly salary of \$158.75.

$$12 \times \$158.75 = \$1905.00,$$

$$\$1905.00 \div 52 = \$36.63 \text{ (weekly compensation),}$$

$$\$36.63 \div 44 = 83\frac{1}{4} \text{ cents (hourly compensation),}$$

$$\text{Overtime—21 hours} \times 83\frac{1}{4} \text{ cents} \times 1\frac{1}{2} = \$26.22.$$

Example B. On assumed monthly salary of \$125.00.

$$12 \times \$125.00 = \$1500.00,$$

$$\$1500.00 \div 52 = \$28.85 \text{ (weekly compensation),}$$

$$\$28.85 \div 44 = 65\frac{1}{2} \text{ cents (hourly compensation),}$$

$$\text{Overtime—21 hours} \times 65\frac{1}{2} \text{ cents} \times 1\frac{1}{2} = \$20.63.$$

3. As an alternative method of computation, plaintiff submits that under the contract between the labor organization representing plaintiff and the employer's organization representing defendant, the monthly compensation given plaintiff by defendant was based on an assumed 48-hour week. The hourly compensation of plaintiff and the assignors of plaintiff is then determined by dividing the weekly compensation by 48 and paying additional half time for hours worked per week between 44 hours and 48 hours up to October 28, 1939, between 42 hours and 48 hours up to October 28, 1940, and between 40 hours and 48 hours since October 28, 1940, and paying one and one-half times said hourly

rate for all hours worked per week in excess of 48 hours.

Applying this method of computation to the same examples as used in subparagraph 2 hereof, the following results are reached:

Example A. On assumed monthly salary of \$158.75.

$$12 \times \$158.75 = \$1905.00,$$

$$\$1905.00 \div 52 = \$36.63 \text{ (weekly compensation),}$$

$$\$36.63 \div 48 = 76\frac{1}{4} \text{ cents (hourly compensation),}$$

$$4 \text{ hours at } \frac{1}{2} \times 76\frac{1}{4} \text{ cents} = \$1.53$$

$$11 \text{ hours at } 1\frac{1}{2} \times 76\frac{1}{4} \text{ cents} = \$12.58$$

$$\$14.11 \quad [38]$$

Example B. On assumed monthly salary of \$125.00.

$$12 \times \$125.00 = \$1500.00,$$

$$\$1500.00 \div 52 = \$28.65 \text{ (weekly compensation),}$$

$$\$28.65 \div 48 = 60 \text{ cents (hourly compensation),}$$

$$4 \text{ hours at } \frac{1}{2} \times 60 \text{ cents} = \$1.20,$$

$$11 \text{ hours at } 1\frac{1}{2} \times 60 \text{ cents} = \$9.90,$$

$$\$11.10$$

4. Defendant contends that the monthly compensation paid plaintiff and the assignors of plaintiff by defendant was intended to and did cover all hours worked in excess of 40 hours per week at one and one-half times the regular rate of pay and that there is no overtime compensation due plaintiff or the assignors of plaintiff from defendant.

5. Alternatively, defendant contends that if the method of computation shown in subparagraph 4 hereof be not accepted, then the overtime due plaintiff and the assignors of plaintiff, if any, should be computed by the following method;

The monthly compensation should be multiplied by 12 and then divided by 52 to obtain the weekly compensation. The weekly compensation thus resulting should be divided each week by the number of hours worked during that week to determine the hourly compensation. Plaintiff and the assignors of plaintiff would have due them under this method of computation one-half times the hourly compensation for each hour worked per week in excess of forty-four during the year ending October 28, 1939, forty-two hours during the year ending October 28, 1940, and forty hours subsequent to October 28, 1940.

This is the method of computation set forth in Interpretative Bulletin No. 4 (July, 1940, issue) issued by the Wage and [39] Hour Division of the United States Department of Labor, paragraph 12, which reads as follows:

“If an employee earns \$23 per week but works a fluctuating number of hours, his regular rate of pay will be the average hourly rate each week. Suppose that during the course of four weeks the employee works 42, 46, 49, and 43 hours. His regular hourly rate of pay each week is approximately 55 cents, 50 cents, 47 cents, and 54 cents, respectively. For the first week the employee is entitled to be paid \$23;

for the second week \$24 ($\$23 + (4 \text{ hours} \times 25 \text{ cents})$) or ($((42 \text{ hours} \times 50 \text{ cents}) + (4 \text{ hours} \times 75 \text{ cents}))$); for the third week approximately \$24.67 ($\$23 + (7 \text{ hours} \times 23\frac{1}{2} \text{ cents})$) or ($((42 \text{ hours} \times 47 \text{ cents}) + (7 \text{ hours} \times 70\frac{1}{2} \text{ cents}))$); For the fourth week approximately \$23.27 ($\$23 + (1 \text{ hour} \times 27 \text{ cents})$) or ($((42 \text{ hours} \times 53.5 \text{ cents}) + (1 \text{ hour} \times 81 \text{ cents}))$)."

Applying this method of computation to the same examples as used in subparagraphs 2 and 3 hereof, the following results are reached:

Example A. On assumed monthly salary of \$158.75.

$$12 \times \$158.75 = \$1905.00,$$

$$\$1905.00 \div 52 = \$36.63 \text{ (weekly compensation),}$$

$$\$36.63 \div 65 = 56\frac{1}{2} \text{ cents (hourly compensation),}$$

$$21 \text{ hours at } \frac{1}{2} \times 56\frac{1}{2} \text{ cents} = \$5.93.$$

Example B. On assumed monthly salary of \$125.00.

$$12 \times \$125.00 = \$1500.00,$$

$$\$1500 \div 52 = \$28.85 \text{ (weekly compensation),}$$

$$\$28.85 \div 65 = 44\frac{1}{2} \text{ cents (hourly compensation),}$$

$$21 \text{ hours at } \frac{1}{2} \times 44\frac{1}{2} \text{ cents} = \$4.67.$$

These issues as to computation involve mixed questions of law and fact to be determined upon the trial. The parties will supplement the stipulated facts by some explanatory testimony.

EXHIBITS

At the pre-trial the following exhibits were introduced without objection by either party and may be introduced at the [40] trial. Each of the parties has reserved the right to offer further exhibits at the trial subject to the discretion of the court:

Defendant's Exhibit 1. Statement showing monthly compensation and board and room paid to plaintiff.

Defendant's Exhibit 2. Statement showing monthly compensation and board and room paid to plaintiff's assignor Robert Vandehey.

Defendant's Exhibit 3. Statement showing monthly compensation and board and room paid to plaintiff's assignor Marion B. Vandehey.

Defendant's Exhibit 4. Statement showing monthly compensation and board and room paid to plaintiff's assignor Floyd Calloway.

Defendant's Exhibit 5. Statement showing monthly compensation and board and room paid to plaintiff's assignor Charles Chapman.

Plaintiff's Exhibit 6. Working agreement, dated September 10, 1940, between Columbia Basin Loggers and Columbia River District Council No. 5, Lumber and Sawmill Workers' Union, affiliated with the International Woodworkers of America, C. I. O. (In connection with this exhibit it is agreed, for the purposes of this case, that said agreement is identical with a prior agreement between the same parties, dated May 22, 1937, and that this agreement may be treated, for the purposes of this case,

as having been in effect at all times subsequent to October 28, 1938.)

Defendant's Exhibit 7. Detailed statement showing the hours worked by plaintiff and the overtime due plaintiff under the method of computation shown in subparagraph 5-B above. [41]

Defendant's Exhibit 8. Detailed statement showing the hours worked by plaintiff's assignor Robert Vandehey under the method of computation shown in subparagraph 5-B above.

Defendant's Exhibit 9. Detailed statement showing the hours worked by plaintiff's assignor Marion B. Vandehey under the method of computation shown in subparagraph 5-B above.

Defendant's Exhibit 10. Detailed statement showing the hours worked by plaintiff's assignor Floyd Calloway under the method of computation shown in subparagraph 5-B above.

Defendant's Exhibit 11. Detailed statement showing the hours worked by plaintiff's assignor Charles Chapman under the method of computation shown in subparagraph 5-B above.

Defendant's Exhibit 12. Interpretative Bulletin No. 3, U. S. Department of Labor, Wage and Hour Division.

Defendant's Exhibit 13. Interpretative Bulletin No. 4, U. S. Department of Labor, Wage and Hour Division.

Plaintiff's Exhibit 14. Interpretative Bulletin No. 5, U. S. Department of Labor, Wage and Hour Division.

Defendant's Exhibit 15. "Working Agreement,

Columbia Basin Loggers and Columbia River District Council of Lumber and Sawmill Workers", entered into June 22, 1936.

Defendant's Exhibit 16. "Arbitration Award and Working Agreement between Columbia Basin Loggers and Columbia River District Council of Lumber and Sawmill Workers," dated May 22, 1937.

No other documents or factual exhibits will be used at the trial or offered as exhibits except those listed above. It is agreed by counsel for both parties and by the court that the Interpretative Bulletins and other rulings of the Administrator under the Fair Labor Standards Act shall not be used as evidence [42] and are not binding upon the court, but shall be considered by the court in the determination of the issues raised herein, the court to give to such rulings the consideration required of them by law.

The foregoing is certified to be a record of the proceedings had at the pre-trial of this cause, and it is Ordered that the issues to be tried herein shall be those herein set forth as controverted issues.

Dated and entered this 9th day of April, 1941.

JAMES ALGER FEE

United States District Judge

[Endorsed]: Filed April 9, 1941. G. H. Marsh, Clerk. [43]

On the 9th day of April, 1941, there was duly Filed in said Court, Defendant's Exhibit No. 7, in words and figures as follows, to wit: [44]

DEFENDANT'S PRE-TRIAL EXHIBIT 7

Received on Trial

WAGE COMPUTATION SHEET

Sheet

File

Date

Name of employee—Ivan Womack
 Address—Glenwood, Oregon Occupation—Baker
 Basis of payment—\$125.00 per month—Room & Board furnished
 Establishment—Consolidated Timber Company Address—Glenwood, Oregon

(a) Work Week Ending	(b) Hours Worked							(c) Total	(d) Hourly Rate of Pay	(e) Total Wages Due	(f) Total Wages Paid	(g) Under- payment	(h) Illegal Deductions	(i) Total Due Worker	
	S	M	T	W	T	F	S								
44 hours															
11/ 5/38	10	12	10	12	11	10	—	65	.44	33.47	28.85	4.62	.05	4.57	
11/12/38	—	—	12½	11	12	10½	10	56	.52	31.97	28.85	3.12	.03	3.09	
11/19/38	10	12	12	11	10	10	—	65	.44	33.47	28.85	4.62	.05	4.57	
11/26/38	10	11	10	10	10	9	—	60	.48	32.69	28.85	3.84	.04	3.80	
12/ 3/38	10	12	10	11	10	11	—	64	.45	33.35	28.85	4.50	.05	4.45	
12/10/38	10	10	10	10	11	10	—	61	.47	32.84	28.85	3.99	.04	3.95	
12/17/38	10	10	10	9	10	9	—	58	.50	32.35	28.85	3.50	.04	3.46	
12/24/38	10	10	9	11	10	9	—	59	.49	32.52	28.85	3.67	.04	3.63	

Work Week Ending	Hours Worked							Total	Hourly Rate of Pay	Total Wages Due	Total Wages Paid	Under- payment	Illegal Deductions	Total Due Worker	
	S	M	T	W	T	F	S								
44 hours															
12/31/38	—	12	12	12	10	12	—	58	.50	32.35	28.85	3.50	.04	3.46	
1/ 7/39	10	10	11	10	11	9	—	61	.47	32.84	28.85	3.99	.04	3.95	
1/14/39	11	10	10	10	11	10	—	62	.47	33.08	28.85	4.23	.04	4.19	
1/21/39	11	11	10	10	10	9	—	61	.47	32.84	28.85	3.99	.04	3.95	
1/28/39	12	11	11	11	10	10	—	65	.44	33.47	28.85	4.62	.05	4.57	
3/ 4/39	—	—	12½	15½	12½	12	14½	67	.43	33.79	28.85	4.94	.05	4.89	
3/11/39	14	12	12	12	12	11	—	73	.40	34.65	28.85	5.80	.06	5.74	
3/18/39	12	12	10	—	—	—	—	34							
3/25/39	—	12	11	11	10	10	—	54	.53	31.50	28.85	2.65	.03	2.62	
4/ 1/39	9	10	10	10	9	10	—	58	.50	32.35	28.85	3.50	.04	3.46	
4/ 8/39	10	9	9	9	10	9	—	56	.52	31.97	28.85	3.12	.03	3.09	
4/15/39	9	10	9	9	10	9	—	56	.52	31.97	28.85	3.12	.03	3.09	
4/22/39	9	10	9	9	10	9	—	56	.52	31.97	28.85	3.12	.03	3.09	
4/29/39	9	10	9	9	9	9	—	55	.52	31.71	28.85	2.86	.03	2.83	
5/ 6/39	9	9	9	9	9	8	—	53	.54	31.28	28.85	2.43	.02	2.41	
5/13/39	9	9	9	9	9	9	—	54	.53	31.50	28.85	2.65	.03	2.62	
5/20/39	9	8	8	8	9	9	—	51	.57	30.84	28.85	1.99	.02	1.97	
								1462		780.77	692.40	88.37	.92	87.45	
															[45]

[45]

WAGE COMPUTATION SHEET

Sheet

File

Date

Name of employee—Ivan Womack
 Address—Glenwood, Oregon Occupation—Baker
 Basis of payment—\$125.00 per month—Room & Board furnished
 Establishment—Consolidated Timber Company Address—Glenwood, Oregon

vs. Ivan Womack

67

(a) Work Week Ending	(b) Hours Worked							(c) Total	(d) Hourly Rate of Pay	(e) Total Wages Due	(f) Total Wages Paid	(g) Under- payment	(h) S. S. Deductions	(i) Total Due Worker	
	S	M	T	W	T	F	S								
44 hours															
6/17/39	—	—	—	8 ³ / ₄	8	7 ¹ / ₂		24 ¹ / ₄			28.85				
6/24/39	8	8 ¹ / ₂	8	8	8	3 ¹ / ₂		44			28.85				
7/ 1/39	8	8	8 ¹ / ₂					24 ¹ / ₂			28.85				
7/15/39	9	9 ¹ / ₂	10	9	6 ¹ / ₂	—	—	44			28.85				
7/22/39	9	10	9	9	7	—	—	44			28.85				
7/29/39	9	9 ¹ / ₂	9	9	9	—	—	45 ¹ / ₂	.63	29.32	28.85	.47	.01		.46
8/ 5/39	9	9	10	11	12	12	12	75	.38		46.83				
8/12/39	12	12	14	12	12	12	12	86	.34		53.69				
8/19/39	11	12	—	11	8	7	—	49	.59		30.59				
8/26/39	8	8	—	9	8	9	7	49	.59		30.59				
9/ 2/39	8	4	—	—	—	—	—	12			28.85				
9/ 9/39	—	9	8 ¹ / ₂	9	9	8 ¹ / ₂	—	44			28.85				
9/16/39	9	9	9	8	8	2	—	45	.64	29.17	28.85	.32	.01		.31

Work Week Ending	Hours Worked							Total	Rate of Pay	Wages Due	Wages Paid	Under- payment	Illegal Deductions	Due Worker	
	S	M	T	W	T	F	S								
44 hours															
10/14/39	—	—	—	—	11	10	—	21			28.85				
10/21/39	9	9	9	10	7	—	—	44			28.85				
42 hours															
10/28/39	9	9	8	8	8	—	—	42			28.85				
11/ 4/39	9	9	8	8	8	—	—	42			28.85				
11/11/39	9	9	8	8	8	—	—	42			28.85				
11/18/39	9	9	8	8	8	—	—	42			28.85				
11/25/39	9	9	10	8	8	—	—	44	.66	29.51	28.85	.66	.01		.65
12/ 2/39	8½	8½	9	8	8	—	—	42			28.85				
12/ 9/39	9	9	8	8	8	—	—	42			28.85				
12/16/39	9	9	8	8	8	—	—	42			28.85				
12/23/39	9	9	8	8	8	—	—	42			28.85				
12/30/39	—	—	10	10	7	—	—	27			28.85				
1/ 6/40	—	9	9	8	8	8	—	42			28.85				
1/13/40	9	9	8	8	8	—	—	42			28.85				
1/20/40	9	9	8	8	8	—	—	42			28.85				
1/27/40	9	9	8	8	8	—	—	42			28.85				
2/ 3/40	9	9	8	8	8	—	—	42			28.85				
2/10/40	9	9	8	8	8	—	—	42			28.85				
2/17/40	9	9	8	8	8	—	—	42			28.85				

(a) Work Week Ending	(b) Hours Worked							(c) Total	(d) Hourly Rate of Pay	(e) Total Wages Due	(f) Total Wages Paid	(g) Under- payment	(h) S. S. Deductions	(i) Total Due Worker
	S	M	T	W	T	F	S							
42 hours														
2/24/40	9	9	8	8	8	—	—	42			28.85			
3/ 2/40	9	9	8	8	8	—	—	42			28.85			
3/ 9/40	9	9	8	8	8	—	—	42			28.85			
3/16/40	9	9	8	8	8	—	—	42			28.85			
3/23/40	9	9	8	8	8	—	—	42			28.85			
3/30/40	9	9	8	8	8	—	—	42			28.85			
4/ 6/40	—	9	9	8	8	—	—	34			28.85			
4/13/40	9	9	8	8	8	—	—	42			28.85			
4/20/40	9	9	8	8	8	—	—	42			28.85			
4/27/40	9	9	8	8	8	—	—	42			28.85			
5/ 4/40	9	9	8	8	8	—	—	42			28.85			
5/11/40	9	9	8	8	8	—	—	42			28.85			
5/18/40	9	9	8	8	8	—	—	42			28.85			
5/25/40	9	9	8	8	8	—	—	42			28.85			
6/ 1/40	—	9	9	8	8	8	—	42			28.85			
6/ 8/40	9	9	8	8	8	—	—	42			28.85			
6/15/40	9	8	9	8	8	—	—	42			28.85			
6/22/40	9	9	8	8	8	—	—	42			28.85			
6/29/40	9	9	8	8	8	—	—	42			28.85			
7/20/40	—	—	—	8	4	8	6	26			28.85			
7/27/40	8	8	8	8	8	—	—	40			28.85			

WAGE COMPUTATION SHEET

Sheet

File

Date

Name of employee—Ivan Womack
 Address—Glenwood, Oregon Occupation—Baker
 Basis of Payment—\$125.00 per month—Room & Board
 Furnished
 Establishment—Consolidated Timber Company Address—Glenwood, Oregon

(a) Work Week Ending	(b) Hours Worked							(c) Total	(d) Hourly Rate of Pay	(e) Total Wages Due	(f) Total Wages Paid	(g) Under- payment	(h) S. S. Deductions	(i) Total Due Worker
	S	M	T	W	T	F	S							
42 hours														
8/ 3/40	8	8	8	8	10	—	—	42			28.85			
8/10/40	10	10	8	—	—	—	—	28			28.85			
8/17/40	10	10	10	10	8	—	—	48	.60	30.65	28.85	1.80	.02	1.78
8/24/40	10	10	10	10	9	—	—	49	.59	30.92	28.85	2.07	.02	2.05
8/31/40	10	10	10	10	8	—	—	48	.60	30.65	28.85	1.80	.02	1.78
9/ 7/40	—	10	11	10	10	—	—	41			28.85			
9/14/40	10	10	10	10	10	10	—	60	.48	33.17	28.85	4.32	.04	4.28
9/21/40	10	10	10	10	10	9	—	59	.49	33.02	28.85	4.17	.04	4.13
9/28/40	10	10	10	10	10	8	—	58	.50	32.85	28.85	4.00	.04	3.96

(a) Work Week Ending	(b) Hours Worked							(c) Total	(d) Hourly Rate of Pay	(e) Total Wages Due	(f) Total Wages Paid	(g) Under- payment	(h) S. S. Deductions	(i) Total Due Worker	
	S	M	T	W	T	F	S								
42 hours															
10/ 5/40	10	10	10	10	10	8	—	58	.50	32.85	28.85	4.00	.04	3.96	
10/12/40	8	10	10	10	10	8	—	56	.52	32.49	28.85	3.64	.04	3.60	
10/19/40	8	10	10	10	10	8	—	56	.52	32.49	28.85	3.64	.04	3.60	
10/26/40	8	10	10	10	10	8	—	56	.52	32.49	28.85	3.64	.04	3.60	
40 hours															
11/ 2/40	9	10	10	10	10	8	—	57	.51	33.18	28.85	4.33	.04	4.29	
11/ 9/40	—	—	10	10	10	9	—	39			28.85				
11/16/40	10	10	10	10	10	8	—	58	.50	33.35	28.85	4.50	.05	4.45	
11/23/40	8	10	10	10	10	8	—	56	.52	33.01	28.85	4.16	.04	4.12	
11/30/40	8	10	10	10	10	8	—	56	.52	33.01	28.85	4.16	.04	4.12	
12/ 7/40	8	10	10	10	9	8	—	55	.52	32.75	28.85	3.90	.04	3.86	
12/14/40	9	9	9	9	10	8	—	54	.53	32.56	28.85	3.71	.04	3.67	
12/21/41	10	10	9	9	8	8	—	54	.53	32.56	28.85	3.71	.04	3.67	
2/ 8/41	—	8	10	10	10	10	—	48	.60	31.25	28.85	2.40	.02	2.38	
2/15/41	—	10	10	10	10	10	—	50	.58	31.75	28.85	2.90	.03	2.87	
2/22/41	—	10	11	10	10	8	—	49	.59	31.50	28.85	2.65	.03	2.62	
2/29/41	—	11	10	11	11	10	—	53	.54	32.36	28.85	3.51	.04	3.47	

[Endorsed]: Filed Apr. 9, 1941. G. H. Marsh, Clerk. [47]

And, to wit, on the 16th day of December, 1941, there was duly filed in said court, an Opinion in words and figures as follows, to wit: [48]

[Title of District Court and Cause.]

OPINION

This action was filed by plaintiff on his own behalf and as assignee of the claims of other employees of defendant in cookhouses operated by defendant near its logging camps, based upon the provisions of the Fair Labor Standards Act of 1938. Pre-trial conferences were held and a pre-trial order was signed by the court. Subsequently, the cause was tried by the court without a jury.

The pre-trial order was drafted jointly by the attorneys for the respective parties and is here set out in full as an excellent example of such an order. The agreed facts are concisely stated and the issues are clear cut for decision, and documents necessary for the determination were marked and listed therein. Such an outstanding consolidated pleading requires special commendation of the draughtsmen.

Shortly stated, the question is whether these employees are covered by the provisions of 7A of the Fair Labor Standards Act of 1938 or are specifically exempt therefrom by the provisions of Section 13.

[49]

Even in an establishment where the employer is engaged in commerce or in the production of goods for commerce, a particular employee there who is

not so engaged does not fall under the act. Specific exemption is given to all employees "engaged in any retail or service establishment the greater part of whose selling or servicing is in interstate commerce." The applicability of this exemption depends according to orthodox interpretation upon "whether the particular establishment possesses the characteristic of a retail or service establishment".

The particular employee, then, is not within the act if he is not engaged in commerce or the production of goods for commerce, and is specifically exempted if the establishment in which he works is mostly selling or servicing in intrastate commerce.

The cook, dishwasher or waiter employed by a company to feed a crew producing logs for interstate shipment is an integral part of the crew and is producing goods for commerce under the definition of the act, where the company furnishes the food and makes no deduction therefor from the wages of the timber workers. *Philadelphia, Baltimore & Washington Railroad Company vs. Smith*, 250 U. S. 101, although under a different statute, is persuasive by analogy upon this point.

However, that decision throws no light upon the clear-cut exemption granted by this Act. To the existence of the exemption, the court now turns.

The restaurant, the cafeteria and the roadside diner are each a typical example of a service establishment which is local in character and renders a service to [50] private individuals for direct con-

sumption at a retail price. (Interpretative Bulletin No. 6, Sections 23 and 24). Even though a cafeteria is operated in a factory by employees of a common employer with the factory workers who are producing goods for commerce, it may still be a service establishment. (Interpretative Bulletin No. 6, Section 39).

There are several factors pertinent to each of these establishments. A cookhouse is a restaurant or roadside diner and, therefore, a typical service establishment. A service was rendered in a physically separate establishment where meals were sold at retail to, and the facilities of the establishment were placed at the disposal of, private individuals for direct consumption and use. Persons not in the employment of defendant or companies under contract with defendant were served upon the same terms as persons so employed, except that the price was higher for the former. Employees of logging companies under contract with defendant were served. There was no requirement that defendant's employees patronize either cookhouse. Those employees who were served in the cookhouse were charged a price for the meals eaten, which in the aggregate sustained the establishment but was not above cost. These payments were deducted from the employees' wages.

Obviously, if either of these cookhouses were operated by an entirely independent concern, it would be designated as a restaurant and would fall in the class of a retail or service establishment.

Such a restaurant would do the majority of its selling or servicing in interstate [51] commerce, irrespective of the fact that meals were sold to the employees of one company only. This factor highlights a fundamental problem. The timber worker is a member of the public. As to meals, he is himself a consumer and purchases food at retail as any other member of the consuming public. This is true whether he is employed or unemployed. The fundamental characteristic of a restaurant is sale at retail to the ultimate consumer in intrastate commerce.

But in this case one circumstance should establish the cookhouses as service establishments. The employees in the woods and the union stipulated that these should be operated at cost and should be self-sustaining. Clearly, the employees actually producing goods for commerce recognize thereby that the cookhouses are maintained for their service and convenience. Under this clause, the burden of any increased wages to cookhouse employees would fall upon those who were engaged in producing goods for commerce. The latter are not required to patronize the cookhouse but it is there for their service if they so desire.

If the buckers and fallers were compelled to eat at a cookhouse and the meals were furnished as a part of the pay, a different situation would be presented. These skilled woodsmen who are paid by the hour and who are not boarded by the company must buy food and service thereof. Any in-

crease in the price of board at the cookhouse will be deducted from the money paid them.

To these factors applicable to both cookhouses, there are special circumstances which relate to the establishment at Glenwood. Although that facility is [52] unquestionably a convenience to the company in keeping the crews fed, it is probably no more so than if it were under entirely independent control. Certainly, it cannot be regarded as a necessary adjunct to defendant's business. This cookhouse caters to persons not in employment of defendant or companies under contract with it. These persons are comparatively few and are charged a higher price. But there is an independent facility, a lunch counter, also located at Glenwood, which is in competition. While this lunch counter could not under present conditions take care of all the trade were the cookhouse closed, its employees are exempt from the operation of the Act, and the possibility of expansion is a circumstance of weight.

Many employees here own their homes and are thus free from the necessity of boarding outside. Some employees live in other places and own cars. These likewise have a choice.

This cookhouse falls under Section 39 of Interpretative Bulletin No. 6:

“Many concerns provide facilities for their employees. In some cases a company operates in its factory a cafeteria or store which is physically separated from the remainder of the plant and is conducted in the same manner as

commonly recognized retail or service establishments which are not affiliated with the company. In these cases, the goods or services are sold for cash to the employees, and the store is normally open to the general consuming public. The employer caters to the needs and wants of the employees viewed as part of the general consuming public and not merely as employees. * * *

There is a sharp differentiation between the conditions at Glenwood and those which prevail at Camp 2. The latter camp is quite isolated. It is seventeen miles from Glenwood. [53] Only a small number of the employees have homes there. Practically it is very difficult for the employees of defendant and companies under contract with defendant to take meals elsewhere. The great majority, in fact, do eat at the cookhouse. Unquestionably, it is more nearly vital for the company to have this eating place there in order to prosecute the production of goods for commerce. There is no independent facility at this camp, and as a practical matter, it would probably be difficult to find any one to embark upon such a business without some favorable arrangement with the company. Although there are exceptions, practically all the patronage of this cookhouse consists of employees of defendant and companies under contract with it.

It is possible to view this establishment as an adjunct of the business of the company, necessary

for the production of goods for commerce and the employees as vital to the logging operation.

The Administrator has adopted this view and has issued a ruling which by its terms apparently covers the situation. This interpretation, in part, reads:

“In these cases the employer does not operate an adjunct which is unrelated to the principal business but the furnishing of the facilities is an integral part of the principal operations. The employer does not satisfy the wants of the employees as part of the general consuming public. Deductions for these facilities are normally made from the cash wages received by the employee. The facilities are not made available to the general public. In these cases, there will not be a separate retail or service establishment within the exemption. Thus, for example, isolated lumber and mining camps operate cookhouses and bunkhouses for employees. These cookhouses and bunkhouses do not serve the general public but are an integral part of the lumber or mining operations.” Section 40, Interpretative Bulletin No. 6. [54]

The interpretation is subject to criticism on several bases. First, a service establishment does not change its character even if it is in an isolated spot and of great practical convenience to the employer. Second, the employees of defendant and employees

of companies under contract with defendant are the "general public" here, purchasing goods and service at retail, even though the price is deducted from their wages. Third, the skilled workers producing goods for commerce are subjected to a greater burden than they would be if working in a settled community, since the cookhouse is to be self-sustaining for the benefit of workers. Fourth, if the employer were to allow an independently controlled establishment to operate a cookhouse here, the skilled worker would pay retail prices at a higher scale and could not longer exercise an influence on the conduct of the cookhouse. Fifth, the policy should be to encourage employers to operate service establishments, such as gasoline filling stations, swimming pools and beauty parlors at cost to the employees, in order to increase the satisfaction of employees at isolated camps and assist in producing goods for commerce.

Influenced by such considerations, the Administrator has previously taken an opposite position. During the pendency of this case and owing apparently to developments in this controversy, the former ruling was repudiated, notwithstanding the fact that certain courts had made the previous pronouncement the basis for decision. *Labates vs. The Interstate Company*, opinion January 29, 1941, Western District Tennessee, Western Division.

Each party has attacked the interpretation of the Administrator when it did not further his cause

and has [55] defended the ruling when it assisted his case. The court believes as a matter of policy the considerations above set out should control as to Camp 2, as well as at Glenwood. Clearly, on the other hand, the last ruling is a permissible one under the language of the statute. There is no question that the Administrator had all the facts before him when it was issued, although he held no hearing. In the nature of things the administrative agency is impressed with the remedial nature of the Act and the urge to carry out the general purpose of Congress. On the other hand, the court is of opinion that exemptions wisely placed in such legislation should be enforced for the protection of the public at large against bureaucratic regulation of matters entirely local in character, such as the purveying of food, to the end that conditions such as those denounced in *Schechter vs. United States*, 295 U. S. 495, shall not again prevail.

But the action of the court here is controlled by the declaration of the United States Supreme Court in *United States vs. American Trucking Association, Inc.*, 310 U. S. 534, 549, where it is said:

“In any case such interpretations are entitled to great weight. This is peculiarly true here where the interpretations involve ‘contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new’”. [*Norwegian Nitrogen Co. vs. United States*, 288 U. S. 294, 315.]

This holding is not affected by the fact that in the consideration of the situation, the Administrator has radically changed position. [56]

The court, therefore, determines that the cook-house at Glenwood is a retail or service establishment and employees thereof are exempt, while that at Camp 2 is an adjunct to the production of goods for commerce and employees therein are assisting in that process.

The remaining question is whether the scales of computation proffered by plaintiff or defendant be adopted. Neither of those offered by plaintiff is supported by any authority and each leads to results which the court considers unreasonable. On the other hand, the primary plan offered by defendant cannot be accepted because the court cannot find from the evidence that the contract between defendant and these employees contains the terms which are inherent in the basis for this plan. The second plan tendered by the defendant is apparently reasonable. Furthermore, it has the sanction of the Administrator and is adopted on the principles discussed above.

Findings and judgment in accordance herewith will be submitted.

[Endorsed]: Filed December 16, 1941. G. H. Marsh, Clerk. By F. L. Buck, Chief Deputy. [57]

And afterwards, to wit, on Thursday, the 8th day of January, 1942, the same being the 42nd Judicial day of the Regular November, 1941, Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [58]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on for hearing before the Honorable James Alger Fee, judge of the above entitled court, on the 7th day of April, 1941, on the pleadings and proofs, and briefs having been submitted and arguments made by counsel for the respective parties, the court, after due deliberation, does hereby make its findings of fact as follows:

FINDINGS OF FACT

I.

This is an action brought under and by virtue of an Act of Congress by the United States for the regulation of commerce among the states, to wit, the Fair Labor Standards Act of 1938 (29 U. S. C. A., Sections 201-219, inclusive).

II.

The complaint contains five causes of action for wages alleged to be due plaintiff and four assignors of plaintiff from defendant. The claims of the four

assignors of plaintiff have been duly and properly assigned by the said assignors [59] to plaintiff.

III.

Defendant, Consolidated Timber Company, is a corporation organized and existing under the laws of the State of Washington, qualified to do business in the State of Oregon. It owns timberlands and is engaged in the business of logging in Washington and Tillamook Counties, Oregon, with headquarters at Glenwood, Washington County. Defendant employs a logging crew, which is engaged in falling and bucking timber and in loading it on cars, and operates a logging railroad, which connects with a common carrier railroad. Defendant also has certain contracts with independent contractors who log parts of its timber and deliver logs to defendant at specified points, where defendant transports them by railroad to the common carrier railroad. A small percentage of the logs cut and produced by defendant is sold locally to mills located in Washington County, Oregon, and is there manufactured into lumber. By far the larger proportion of the logs produced by defendant is, however, transported by common carrier railroads to a point on the Willamette Slough in Multnomah County, Oregon, where the logs are dumped into the water and rafted. Defendant sells the rafts of logs to various sawmills, about 80 per cent of them going to sawmills in Oregon and about 20 per cent to sawmills in Washington. All sales are made and completed

entirely within the State of Oregon and the purchasers send tugboats to pick up the rafts of logs which they have purchased and transport them to their mills wherever located. The logs are then manufactured into lumber by the purchaser mills and in each instance at least 70 per cent of the lumber manufactured from said logs moves in interstate commerce. [60]

IV.

Between October 24, 1938, and June 28, 1940, defendant operated at Glenwood, Oregon, what is known in logging parlance as a cookhouse. The cookhouse consisted of a kitchen and a dining room in a building separate and apart from the other buildings of defendant. Defendant's employees were permitted, but not required, to use the facilities of the cookhouse. Meals were then sold to them at fixed rates of 45 cents per meal for employees and 50 cents per meal for strangers. Those employees who used the facilities of the cookhouse had deducted from their wages the cost of the meals taken by them. Strangers paid for their meals in cash. Said cookhouse in Glenwood, Oregon, was used not only by employees of defendant, but also by employees of logging companies under contract with defendant, by employees of some independent business operated at Glenwood, and by others. Many of defendant's employees lived in Glenwood and ate at home. The greater proportion of defend-

ant's employees did not use the facilities of the cookhouse. For example, during a typical month in which defendant employed 302 persons, 217 men regularly used defendant's cookhouse. Of these, 110 were employees of defendant (including 18 cookhouse employees), 101 were employees of logging companies under contract with defendant, and 6 were employees of independent businesses operated at Glenwood; 192 employees of defendant did not use the cookhouse facilities. During the same typical month, 302 meals were served to strangers.

V.

Subsequent to June 10, 1940, defendant opened and has since operated a cookhouse at a point known as Camp 2 located approximately 17 miles southwest of Glenwood. This cookhouse [61] consists of a kitchen and dining room in a building separate and apart from other buildings of defendant. The facilities of this cookhouse are used by substantially all of defendant's employees at Camp 2, as it is the only practicable facility for eating at Camp 2. No employees, however, are required to eat there and some employees occasionally go back to Glenwood, 17 miles away, for their meals, though this is rarely done. The said cookhouse is also used by employees of contractors of defendant and by the few members of the public who come to Camp 2. Meals are paid for at the same rates and in the same manner as was done at Glenwood.

VI.

At all times herein mentioned, defendant's operations were subject to a collective bargaining agreement between Columbia Basin Loggers, an employers' organization of which defendant was a member, and Columbia River District Council No. 5, Lumber and Sawmill Workers' Union, affiliated with the International Woodworkers of America (C. I. O.), of which substantially all of defendant's employees were members. By the provisions of said working agreements, one dated May 22, 1937, and the other dated September 10, 1940, it was provided, among other things:

"ARTICLE XV

Cook House Operation on Basis of Cost

Employer-operated cook houses shall be conducted upon the basis of cost, it being the purpose hereof that such cookhouses shall be self-sustaining but shall not earn a profit. Price of meals charged employees in such cook houses shall be based upon the principle here announced, and such price in each operation shall be settled by negotiation between the Employer and the Plant Committee."

VII.

Plaintiff and the assignors of plaintiff, in the second [62] to fifth causes of action, are and have been employed in both of defendant's cookhouses; plaintiff as a baker and plaintiff's assignors as

dishwashers, kitchen helpers and second cook. Their duties consisted of preparing food and operating the kitchens. The food is served to and sold to defendant's employees and others who use the cookhouses at the rates hereinbefore set out. Plaintiff and plaintiff's assignors had been paid by defendant a fixed monthly wage for a 26-day month. Substantially all other employees of defendant are paid by the hour. Plaintiff and plaintiff's assignors perform no services for defendant other than in said cookhouses.

VIII.

Defendant employs from 275 to 315 employees. All of defendant's employees (other than salaried employees) engaged in its logging operations are employed on a 40-hour week, and have been at all times since October 24, 1938, and all of said employees are paid time and one-half for all time in excess of 40 hours per week. Defendant, however, employs a limited number of employees on a monthly basis at an agreed monthly wage, including plaintiff and the assignors of plaintiff. Although the logging operations are carried on only five days per week, the cookhouses in which plaintiff and plaintiff's assignors are employed are customarily operated seven days per week for the reason that some of those using the cookhouses desire to have the accommodations available even when the logging operations are not running (the cookhouses being operated by a skeleton crew when operations are down).

IX.

The regular monthly wages of the plaintiff, Ivan Womack, while working at Camp 2 and to the date of the filing of the complaint was the sum of \$125, and during said period he [63] worked the hours and was paid the wages as shown on Exhibit A, attached to these findings of fact and made a part hereof, and there is due and owing said Ivan Womack as overtime the sum of \$41.80, less 42 cents for social security, leaving a balance of \$41.38. The regular monthly wages of plaintiff's assignor Robert Vandehey was the sum of \$85 while working at Camp 2 and to the date of the filing of the complaint, and during said period he worked the hours and was paid the wages as shown on Exhibit B, attached to these findings of fact and made a part hereof, and there is due and owing plaintiff for overtime worked by said Robert Vandehey the sum of 66 cents, less 1 cent for social security, leaving a balance of 65 cents. The regular monthly wages of plaintiff's assignor Charles Chapman was the sum of \$125 while working at Camp 2 and to the date of the filing of the complaint, and during said period he worked the hours and was paid the wages as shown on Exhibit C attached to these findings of fact and made a part hereof, and there is due and owing plaintiff for overtime worked by said Charles Chapman the sum of \$46.41, less 45 cents for social security, leaving a balance of \$45.96. The regular monthly wages of plaintiff's assignor

Lloyd Calloway was the sum of \$85 per month while working at Camp 2 and to the date of the filing of the complaint, and during said period he worked the hours and was paid the wages as shown on Exhibit D attached to these findings of fact and made a part hereof, and there is due and owing plaintiff for overtime worked by said Lloyd Calloway the sum of \$20.07, less 20 cents for social security, leaving a balance of \$19.87. Plaintiff's assignor Marion Vandehey performed no work at Camp 2 during the period covered by the complaint and is not entitled to recover herein. [64]

X.

The sum of \$500 is a reasonable attorney's fee for the services of plaintiff's attorneys.

Based upon the foregoing findings of fact, the court does make and enter herein the following

CONCLUSIONS OF LAW

I.

The work performed by plaintiff and the assignors of plaintiff at the cookhouses at Glenwood and Camp 2 is necessary to the production of goods for commerce within the meaning of Section 7 (a) of the Fair Labor Standards Act of 1938 (53 Stat. 1060, 29 U. S. C. A., Sec. 207).

II.

The cookhouse at Glenwood is a retail or service establishment within the meaning of Section 13

(a) (2) of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. A., Sec. 213), and the provisions of Sections 6 and 7 of the Fair Labor Standards Act therefore do not apply to plaintiff and the assignors of plaintiff for work performed by them at the cookhouse at Glenwood.

III.

The cookhouse at Camp 2 is not a retail or service establishment within the meaning of Section 13 (a) (2) of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 28 U. S. C. A., Sec. 213), and the provisions of Sections 6 and 7 of the Fair Labor Standards Act of 1938 therefore apply to the work performed by plaintiff and the assignors of plaintiff at Camp 2. [65]

IV.

Under the provisions of Section 7 (a) of the Fair Labor Standards Act of 1938, plaintiff and the assignors of plaintiff are entitled to recover from defendant compensation for all hours worked by them at Camp 2 in excess of 42 hours per week prior to October 24, 1940, and in excess of 40 hours per week subsequent to October 24, 1940, at one and one-half times the regular hourly rate at which they were employed. The regular hourly rate of plaintiff and the assignors of plaintiff, all of whom were employed by the month, shall be determined in accordance with paragraph 12 of Interpretative Bulletin No. 4 (July 1940 issue) issued by the Wage and Hour Division of the United States Department

of Labor, to wit, by multiplying the monthly compensation of each of said employees by 12 and then dividing the result by 52, thus obtaining the weekly compensation, and then dividing the weekly compensation thus determined by the number of hours worked during each week, which will result in the hourly rate on which said overtime shall be based. The method of computation of overtime is as illustrated in Exhibits A, B, C and D attached to and made a part of these findings and conclusions.

V.

Under the provisions of Section 16 (b) of said Fair Labor Standards Act of 1938, plaintiff and the assignors of plaintiff are entitled to recover from defendant, in addition to the overtime due them as above provided, an equal amount as liquidated damages.

Dated this 8th day of January, 1942.

JAMES ALGER FEE

United States District Judge

[Endorsed]: Filed January 8, 1942. G. H. Marsh, Clerk. By R. DeMott, Deputy Clerk. [66]

And afterwards, to wit, on Thursday, the 8th day of January, 1942, the same being the 57th Judicial day of the Regular November, 1941, Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [67]

In the District Court of the United States
for the District of Oregon

Civil No. 522

IVAN WOMACK,

Plaintiff,

vs.

CONSOLIDATED TIMBER COMPANY,

a corporation,

Defendant.

DECREE

This cause having come on to be heard before the Honorable James Alger Fee, Judge of the above entitled Court, evidence having been submitted and the matter having been argued orally and briefs having been submitted by the respective parties, and the Court after due consideration having made and filed its findings,

It is decreed that plaintiff recover of and from the defendant the sum of Two Hundred Fifteen and 72/100 (\$215.72) Dollars, and the further sum of Five Hundred (\$500.00) Dollars, attorneys' fee, and that plaintiff recover of and from the defendant for costs and disbursements the sum of Thirty-four 96/100 Dollars, to be taxed, with interest on said sums at 6% per annum from the date hereof until paid.

And it is so ordered.

Dated this 8th day of January, 1942.

JAMES ALGER FEE

Judge

[Endorsed]: Filed January 8, 1942. G. H. Marsh,
Clerk. By R. DeMott, Deputy Clerk. [68]

And afterwards, to wit, on the 21st day of January, 1942, there was duly filed in said Court, a Notice by Defendant of Appeal, in words and figures as follows, to wit: [69]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Consolidated Timber Company, defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered herein on January 8, 1942.

HART, SPENCER, McCULLOCH &
ROCKWOOD

PHILIP CHIPMAN

R. W. MAXWELL

Attorneys for Consolidated
Timber Company,
1410 Yeon Building,
Portland, Oregon.

[Endorsed]: Filed January 21, 1942. G. H. Marsh,
Clerk. By F. L. Buck, Chief Deputy. [70]

And Afterwards, to wit, on the 21st day of January, 1942, there was duly Filed in said Court, a Supersedeas Bond On Appeal by Defendant, in words and figures as follows, to wit: [71]

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men by These Presents, that the undersigned, Consolidated Timber Company, a corporation, as principal, and Fidelity and Deposit Company of Maryland, a corporation, having an office in Portland, Oregon, and being duly authorized to transact business pursuant to the Act of Congress of August 13, 1894, entitled "An Act relative to recognizances, stipulations, bonds and undertakings, and to allow certain corporations to be accepted as surety thereunder," as surety, are held and firmly bound unto Ivan Womack in the full and just sum of one thousand dollars (\$1,000.00) to be paid to the said Ivan Womack, his heirs and assigns; to which payment well and truly to be made the undersigned bind themselves, their successors and assigns, jointly and firmly by these presents.

Whereas, lately at a term of the District Court of the United States for the District of Oregon in a suit pending in said court between Ivan Womack, as plaintiff, and Consolidated Timber Company, a corporation, as defendant, a judgment was rendered against said defendant, Consolidated Timber Company, for the sum of \$715.72 and costs; and the said Consolidated Timber Company, a corporation, having filed its notice of appeal herein to the United States Circuit Court of Appeals for the [72] Ninth Circuit to reverse said judgment,

Now, the condition of the above obligation is such that if the said Consolidated Timber Company, a corporation, shall prosecute its appeal to effect and shall pay the amount of said judgment and answer all damages and costs if it fails to make its plea good, then the above obligation to be void; otherwise to remain in full force and effect.

In Witness Whereof, the said principal and surety have executed this bond on this 19th day of January, 1942.

CONSOLIDATED TIMBER COM-
PANY, a corporation
HART, SPENCER, McCULLOCH
& ROCKWOOD
PHILIP CHIPMAN
Its Attorneys

Principal

FIDELITY AND DEPOSIT COM-
PANY OF MARYLAND

By TOM J. MAHONEY, JR. (Seal)

Its Attorney in Fact

Surety.

The above bond on appeal is hereby approved:

JAMES ALGER FEE

United States District Judge.

State of Oregon,
County of Mult.—ss.

Due service of the within Supersedeas Bond is hereby accepted at Portland, Oregon, this 20 day of Jan. 1942 by receiving a copy thereof, duly certified to as such by Philip Chipman of attorneys for defendant.

JAMES LANDYE,
Attorney for Plaintiff.

[Endorsed]: Filed January 21, 1942. G. H. Marsh,
Clerk. By F. L. Buck, Chief Deputy. [73]

And Afterwards, to wit, on the 21st day of January, 1942, there was duly Filed in said Court, a Statement of Points on which appellant intends to rely in words and figures as follows, to wit: [74]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH AP-
PELLANT INTENDS TO RELY ON AP-
PEAL.

Comes now Consolidated Timber Company, defendant-appellant herein, and makes this its statement of points upon which it intends to rely on the appeal of this case to the United States Circuit Court of Appeals for the Ninth Circuit.

Point I.

Employees in logging camp cookhouses are not engaged in the production of goods for commerce

within the meaning of Section 7 (a) of the Fair Labor Standards Act of 1938 (53 Stat. 1060, 29 U. S. C. A., Sec. 207).

The District Court therefore erred in making its Conclusion of Law No. 1 that such work constituted production of goods for commerce within the meaning of said section.

Point II.

A logging camp cookhouse located at a remote point is a retail or service establishment within the meaning of Section 13 (a) (2) of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 28 U. S. C. A., Sec. 213), and the provisions of Sections 6 and 7 of the Fair Labor Standards Act of 1938 therefore do not apply to work performed in such a logging camp cookhouse.

The District Court therefore erred in entering its [75] Conclusion of Law No. 3.

All those parts of the record designated in the "Designation of Portions of Record on Appeal" are necessary in connection with the consideration of each of these points.

Respectfully submitted,

HART, SPENCER, McCULLOCH
and ROCKWOOD

PHILIP CHIPMAN,
R. W. MAXWELL,

Attorneys for Defendant-
Appellant.

State of Ore.

County of Mult.—ss.

Due service of the within Statement is hereby accepted at Portland, Oregon, this 20th day of Jan., 1942 by receiving a copy thereof, duly certified to as such by Chipman of attorneys for Defendant.

JAMES LANDYE

Attorney for Plaintiff.

[Endorsed]: Filed January 21, 1942. G. H. Marsh, Clerk. By F. L. Buck, Chief Deputy. [76]

And Afterwards, to wit, on the 22nd day of January, 1942, there was duly filed in said Court, a Notice by Plaintiff of Cross Appeal in words and figures as follows, to wit: [77]

[Title of District Court and Cause.]

NOTICE OF CROSS APPEAL

Notice is hereby given that Ivan Womack, plaintiff above named, hereby cross appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered herein on January 8, 1942.

Dated this 22nd day of January, 1942.

GREEN & LANDYE

Attorneys for Ivan Womack
1003 Corbett Building
Portland, Oregon

Service of the foregoing notice of cross appeal is hereby accepted this 22nd day of January, 1942.

HART, SPENCER, McCULLOCH & ROCKWOOD

PHILIP CHIPMAN

Attorneys for Defendant-Appellant.

[Endorsed]: Filed January 22, 1942. G. H. Marsh, Clerk. By F. L. Buck, Chief Deputy. [78]

And Afterwards, to wit, on the 22nd day of January, 1942, there was duly Filed in said Court, a Bond for Costs on Cross Appeal in words and figures as follows, to wit: [79]

[Title of District Court and Cause.]

COST BOND ON CROSS APPEAL

4529976

Whereas, Ivan Womack, the plaintiff above named, recovered a judgment against the Consolidated Timber Company, a corporation, defendant above named, for the sum of Seven Hundred Fifteen and 72/100 (\$715.72) Dollars in a civil action tried before the Honorable James Alger Fee, a Judge in and for the above entitled Court, and judgment having been rendered on the 8th day of January, 1942; and,

Whereas, Ivan Womack, plaintiff, has filed notice of appeal from the said judgment as cross appellant to the United States Circuit Court of Appeals for the 9th Circuit;

Now, Therefore, Ivan Womack, plaintiff and cross appellant, as principal, and the Fidelity and Deposit Company of Maryland, a corporation, having an office in Portland, Oregon, and being duly authorized to transact business pursuant to the Act of Congress of August 13th, 1894, entitled "An Act relative to recognizances, stipulations, bonds and undertakings, and to allow certain corporations to be accepted as surety thereunder," as surety, undertake that said cross appellant will pay all costs and disbursements which may be awarded against him on said cross appeal, and that said cross appellant will satisfy any judgment for costs which may be given against him in the appellate court on appeal.

In Witness Whereof, the said principal and surety have executed this bond on the 22nd day of January, 1942.

IVAN WOMACK
GREEN & LANDYE

By GREEN & LANDYE,
JAMES LANDYE

His Attorney

Principal.

(Seal)

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND

By CLARENCE D. PORTER

Its Attorney-in-Fact

Surety.

The foregoing bond on cross appeal is hereby approved.

.....
United States District Judge.

[Endorsed]: Filed January 22, 1942. G. H. Marsh,
Clerk. By F. L. Buck, Chief Deputy. [80]

—
And Afterwards, to wit, on the 22nd day of January, 1942, there was duly Filed in said Court, a Statement of Points on which cross-appellant will rely, in words and figures as follows, to wit: [81]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH RESPONDENT INTENDS TO RELY ON CROSS APPEAL.

Comes now Ivan Womack, plaintiff-respondent herein, and makes this his statement of points upon which he intends to rely on the cross appeal of this case to the United States Circuit Court of Appeals for the Ninth Circuit.

Point I.

The cookhouse at Glenwood is not a retail or service establishment within the meaning of section 13 (a) (2) of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. A., sec. 213), and the provisions of sections 6 and 7 of the Fair Labor Standards Act therefore do apply to plaintiff and the

assignors of plaintiff for work performed by them at the cookhouse at Glenwood.

The District Court therefore erred in making a finding that the cookhouse at Glenwood is a retail or service establishment within the meaning of section 13 (a) (2) of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. A., sec. 213), and the provisions of sections 6 and 7 of the Fair Labor Standards Act therefore do not apply to plaintiff and the assignors of plaintiff for work performed by them at the cookhouse at Glenwood.

All those parts of the record designated in the "Joint Designation of Portions of Record on Appeal" are necessary in connection with the consideration of each of these points.

Respectfully submitted

GREEN & LANDYE

Attorneys for Plaintiff-Respondent.

Service of the foregoing statement of points is hereby accepted this 22nd day of January, 1942.

HART, SPENCER, McCULLOCH &
ROCKWOOD

Attorneys for Defendant-Appellant.

[Endorsed]: Filed January 22, 1942. G. H. Marsh,
Clerk. By F. L. Buck, Chief Deputy. [82]

And Afterwards, to wit, on the 23rd day of January, 1942, there was duly Filed in said Court, a Joint Designation of Contents of the Record, in words and figures as follows, to wit: [83]

[Title of District Court and Cause.]

JOINT DESIGNATION OF PORTIONS OF
RECORD ON APPEAL

To George H. Marsh, Esquire, Clerk of the above
entitled court:

The defendant-appellant and plaintiff-cross ap-
pellant hereby jointly make this their designation of
the portions of the record desired on appeal.

1. Complaint. From which may be omitted Ex-
hibits A to E inclusive.

2. Answer.

3. Pre-trial Order. To which should be attached
Exhibit 7.

4. Opinion of Judge Fee (omitting Pre-trial
Order).

5. Findings of Fact and Conclusions of Law,
omitting exhibits annexed thereto.

6. Judgment.

7. Defendant's Notice of Appeal.

8. Defendant's Bond on Appeal.

9. Plaintiff's Notice of Cross Appeal.

10. Plaintiff's Bond on Cross Appeal.

11. Condensed Statement of Testimony.

12. Defendant's Statement of Points on Appeal.

13. Plaintiff's Statement of Points on Cross Ap-
peal.

Except as indicated above, none of the testimony nor exhibits need be included in the record. [84]

Respectfully submitted,

HART, SPENCER, McCULLOCH
& ROCKWOOD

PHILIP CHIPMAN

ROBERT W. MAXWELL

Attorneys for Consolidated Timber Company, Defendant-Appellant.

GREEN & LANDYE

Attorneys for Ivan Womack, :
Plaintiff-Cross Appellant.

[Endorsed]: Filed January 23, 1942. G. H. Marsh, Clerk. By F. L. Buck, Chief Deputy. [85]

And Afterwards, to wit, on the 23rd day of January, 1942, there was duly Filed in said Court, a Condensed Statement of Testimony in words and figures as follows, to wit: [86]

CONDENSED STATEMENT OF TESTIMONY

IVAN WOMACK,

plaintiff herein, testified in substance as follows:

Plaintiff is employed by defendant, Consolidated Timber Company. He is at present employed in the cookhouse known as Camp 2, which is located on a hill seventeen miles from Glenwood. The cookhouse is one large building where food is prepared for the

(Testimony of Ivan Womack.)

men and the bunkhouses are on the sidehill approximately 100 or 150 feet from the cookhouse. Adjoining buildings are power plant and supply house.

Breakfast is served to the men and they eat it at the cookhouse. Lunches are furnished them but they take them with them. Supper is served at the cookhouse.

Plaintiff has worked for Consolidated Timber Company since October, 1937. Prior to June 28, 1940, he was employed at the cookhouse at Glenwood. Glenwood is about thirteen miles west of Forest Grove. There is a postoffice at Glenwood. There are family houses about two miles from the Consolidated camp.

The only way to get from Glenwood to Camp 2 is by train or speeder. There is no road to Camp 2. The trip takes about an hour and fifteen minutes.

At the Camp 2 operation the cookhouse is used mostly by the Consolidated crew. Sometimes they run in a few gyppo crews for convenience.

Around Glenwood there are no other eating facilities. In August or September Mr. McCutcheon put in at the postoffice what the witness would call a hot dog or sandwich place for the transient trade, and he serves ice cream and sandwiches and hot coffee, and he has approximately half a dozen stools. This was [87] done in August of 1940.

(Testimony of Ivan Womack.)

Witness is a member of Local 5, C. I. O.

Cross Examination

The cookhouse at Glenwood is still being operated and is being used, but the witness could not say it was being operated by the Company "due to a deal with the union."

TESTIMONY FOR DEFENDANT

LLOYD R. CROSBY

testified for the defendant as follows:

He is manager of Consolidated Timber Company and has been since its operations were started in 1934.

Asked to describe what buildings and industries are located at Glenwood, Mr. Crosby stated that at Glenwood there is the Glenwood Lumber Company, a sawmill in which defendant has no interest, the Wasser-Mowatt Shingle Company, a shingle mill in which defendant has no interest, and the defendant. Each of the industries has buildings. The defendant maintains an office building, a bath house, cookhouse building, several bunkhouses, machine shop and car shop. In addition there are about 50 residences around there.

Defendant operated its cookhouse at Glenwood from 1934 up until about August, 1940. During that period the cookhouse was used by others than employees of defendant. A majority of defend-

(Testimony of Lloyd R. Crosby.)

ant's employees never ate at the cookhouse. A majority of them ate at home; many of them lived near Glenwood; many of them at Forest Grove; some at West Timber; some at Hillsboro and some at Vernonia. Most of the unmarried employees and some of the married ones used the cookhouse. There were no other cookhouses operated at Glenwood, but at West Timber there were boarding houses and at Forest Grove there were boarding houses. Maintenance of the cookhouse at Glenwood was for convenience and not as a necessity for the operations of the defendant as the logging operations could have been carried on without [88] maintaining a cookhouse.

Cross Examination

At Glenwood the defendant has fed a considerable number of "gyppo" operators. The term "gyppo" generally refers to a small logging company. The gyppos were under contract with defendant. The defendant paid their pay rolls only when they didn't have enough money to pay them themselves.

At various times there was no cookhouse at Glenwood. The witness thinks it is fair to presume that if over half of the employees preferred not to live there he could have a crew in which nobody lived there. There has never been a time when the witness could not have employed men who preferred to live at home rather than at the camp. Thereupon the following occurred:

(Testimony of Lloyd R. Crosby.)

“Q. In other words, what you mean is then that if you laid off all the men who lived in Portland and other places and hired local people possibly they could have all lived around there?

A. No. That could be done, but we never wanted to do anything like that. We thought we had men working there who were good employees, and for their convenience we preferred to run a cookhouse so that they could stay there and avail themselves of the work if they wanted to. Nobody had to, in fact a lot of single men boarded with private families or some place rather than pay board to the company.”

If the company had not operated a cookhouse many of the employees could have stayed at West Timber, as many of them did. Many could have stayed at Forest Grove, as many did. There is room in the community for 110 men. West Timber is about nine miles from Glenwood. Forest Grove is about thirteen miles from Glenwood.

At one time the company contracted the cookhouse to an independent contractor, but some of the men thought the contractor was making too much money (which he wasn't) and the defendant took over the cookhouse from the contractor, but there has never been a time when we haven't had people wanting to come in and put a [89] restaurant in the camp. Defendant chose not to allow them to do it but there have been many applications.

(Testimony of Lloyd R. Crosby.)

The cookhouse at Glenwood is operating now but not by defendant. A private individual is running it with an agreement with the union.

The agreement with the union provides that the cookhouse shall be self-supporting and that the men will pay enough for board to compensate the company for the cost. Apparently the union does not believe the figures we give them for cost, and so rather than guarantee to pay the cost they want the company to run it and take the loss. The witness requested the union to guarantee the cost of running the cookhouse and the company would supply certain things free. The union could pay the cookhouse employees such rates as it wanted to. The union, however, refused the proposition.

As far as the cookhouse at Camp 2 is concerned, the witness knows of no employees who do not eat at the cookhouse. Two or three from up there go back and forth on the speeder. All of the others eat at the cookhouse. It is necessary to have a cookhouse at Camp 2, whether run by the defendant or by somebody else. The Company would prefer to have somebody else run it but the union objects to it.

Redirect Examination

The cookhouse at Glenwood is being operated by a member of the union who runs the cookhouse on his own hook. The company charges him a dollar a month rent for the facilities and he runs the cookhouse and whatever profit he makes, if any, is his. It is run as a private enterprise.

(Testimony of Lloyd R. Crosby.)

As for other eating facilities near Camp 2, there is another camp about two miles from Camp 2 and there is a boarding [90] house there and anyone who wants to can go there and board. As far as the witness knows none of the employees at Camp 2 go over there. That cookhouse is being operated as an independent enterprise similar to the present operations at Glenwood, or so the witness understands.

REBUTTAL

EDWARD McSORLEY

testified for the plaintiff as follows:

Witness is business agent for Local No. 5 of the I. W. A., affiliated with the C. I. O. In the opinion of the witness it is necessary to have a cookhouse at Glenwood in order for defendant to operate.

[Endorsed]: Filed Jan. 23, 1942. G. H. Marsh, Clerk. By F. L. Buck, Chief Deputy. [91]

United States of America,
District of Oregon—ss.

I, G. H. Marsh, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 91, inclusive, constitute the transcript of record on appeal from a Decree of said Court, in a cause therein numbered Civil 522, in which Ivan Womack

is plaintiff, appellee, and cross-appellant, and the Consolidated Timber Company, a corporation, is defendant, appellant, and cross-appellee; that said transcript has been prepared by me in accordance with the joint designation filed by said appellants and rules of court; that I have compared the foregoing transcript with the original record thereof and that the foregoing transcript is a full, true and correct transcript of the record and proceedings had in said Court in said cause, as the same appears of record and on file at my office and in my custody, prepared in accordance with the said designation and rules of Court.

I further certify that the cost of the foregoing transcript is \$17.15, and that the same has been paid by said appellants.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Portland, in said District, this 3d day of February, 1942.

(Seal)

G. H. MARSH,

Clerk. [92]

[Endorsed]: No. 10048. United States Circuit Court of Appeals for the Ninth Circuit. Consolidated Timber Company, a corporation, Appellant, vs. Ivan Womack, Appellee. Ivan Womack, Appellant, vs. Consolidated Timber Company, a corporation, Appellee. Transcript of Record. Upon Appeals from the District Court of the United States for the District of Oregon.

Filed February 9, 1942.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10048

CONSOLIDATED TIMBER COMPANY,
a corporation,

Appellant,

vs.

IVAN WOMACK,

Appellee.

IVAN WOMACK,

Cross Appellant,

vs.

CONSOLIDATED TIMBER COMPANY,
a corporation,

Cross Appellee.

STIPULATION

The parties to this appeal hereby stipulate as follows:

1. Appellant's statement of points to be relied on on appeal as filed in the United States District Court shall stand as the statement of points in the United States Circuit Court of Appeals.

2. Cross Appellant's statement of points to be relied on on appeal as filed in the United States District Court shall stand as the statement of points in the United States Circuit Court of Appeals.

3. The entire record as designated and certified by the United States District Court shall be printed.

Dated at Portland, Oregon, this 2d day of February, 1942.

HART, SPENCER, McCULLOCH &
ROCKWOOD

PHILIP CHIPMAN

R. W. MAXWELL

Attorneys for Consolidated Timber
Company, Appellant and Cross
Appellee.

GREEN & LANDYE

Attorneys for Ivan Womack,
Appellee and Cross Appellant

[Endorsed]: Filed Feb. 9, 1942. Paul P. O'Brien,
Clerk.

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United States Circuit Court of Appeals

For the Ninth Circuit

CONSOLIDATED TIMBER COMPANY, a corporation
Appellant

vs.

IVAN WOMACK
Appellee

IVAN WOMACK
Appellant

vs.

CONSOLIDATED TIMBER COMPANY, a corporation
Appellee

Upon Appeal from the United States District Court
for the District of Oregon

BRIEF OF APPELLANT CONSOLIDATED TIMBER COMPANY

ROBERT W. MAXWELL,

PHILIP CHIPMAN,
Attorneys for Appellant

HART, SPENCER, McCULLOCH AND ROCKWOOD,
Of Counsel for Appellant

FILED

APR - 3 1942

PAUL P. O'BRIEN,

CLERK

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No. 10048

United States Circuit Court of Appeals

For the Ninth Circuit

CONSOLIDATED TIMBER COMPANY, a corporation

Appellant

vs.

IVAN WOMACK

Appellee

IVAN WOMACK

Appellant

vs.

CONSOLIDATED TIMBER COMPANY, a corporation

Appellee

Upon Appeal from the United States District Court
for the District of Oregon

BRIEF OF APPELLANT CONSOLIDATED TIMBER COMPANY

JURISDICTION

This is an action to recover wages and penalty alleged to be due appellee from appellant under the provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 28 U. S. C. A. Secs. 201-219). It was

commenced by the appellee, as plaintiff, filing a summons and complaint in the District Court of the United States for the District of Oregon (Tr. p. 2).

The District Court of the United States for the District of Oregon had jurisdiction of this cause under the provisions of Section 17 of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 28 U. S. C. A. Sec. 381). The issues of fact and law were tried and determined by the court sitting without a jury, no jury having been demanded by either party, and the court thereupon made and entered its findings of fact and conclusions of law and decree (Tr. pp. 72, 82).

This court has jurisdiction to review by appeal the judgment of the District Court under the provisions of Section 128 of the Judicial Code as amended (28 U. S. C. A. Sec. 225). This case is not one in which a direct review may be had in the Supreme Court of the United States under the provisions of Section 238 of the Judicial Code as amended (28 U. S. C. A. Sec. 245).

STATUTES INVOLVED

The only statute here involved is the Fair Labor Standards Act of 1938.

STATEMENT OF THE CASE

This case presents for decision two principal questions:

1. Whether employees employed by a company engaged in the business of logging are "engaged in the production of goods for commerce" within the meaning of the Fair Labor Standards Act of 1938 where said employees are employed to assist in preparing and serving food and to do other similar tasks in and about the cookhouse or restaurant which is owned and operated by said company.

2. If such employees are held to be engaged "in the production of goods for commerce" within the meaning of said Act, are they exempt under Section 13 (a) (2) of said Act as employees engaged "in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce"?

The cross-appeal raises precisely the same question with respect to a cookhouse of the non-isolated type.

Many logging companies on the West Coast maintain cookhouses, which is logging terminology for restaurants. These cookhouses are open to the general public. Employees of the logging companies are not required to use the cookhouse facilities. These cookhouses are operated on a nonprofit basis, that is, the charge made for meals served is fixed so as to cover only the cost thereof. Cookhouses of logging companies may be broadly classed into two types; the

first, cookhouses situated in a settled community where other facilities for eating are immediately available and, second, cookhouses isolated from settled communities and other established restaurants or eating places. This case involves both types.

The court below held that employees employed in both types of cookhouses were engaged in the production of goods for commerce within the meaning of Section 7 (a) of the Fair Labor Standards Act, but that employees of the cookhouse located in a settled community were exempt under Section 13 (a) (2) of the Act, while employees in the isolated type were not exempt under Section 13 (a) (2) of the Act.

For the convenience of the court, and by agreement between the parties, both types of cookhouses will be discussed in this brief.

A subsidiary question to be considered on the appeal is the effect to be given to certain Interpretative Bulletins issued from time to time by the Administrator of the Wage and Hour Division of the Department of Labor, who is charged with the enforcement of the Fair Labor Standards Act.

STATEMENT OF FACTS

Appellant Consolidated Timber Company carries on extensive logging operations in northwestern Oregon.

All logs produced by appellant are sold and delivered in the State of Oregon, but about 20 per cent ultimately go to sawmills in the State of Washington (Tr. p. 73). Appellant's headquarters is located in the town or village of Glenwood, Oregon, where it maintained an office building, machine shop, car house, several other buildings, and the cookhouse involved in the cross-appeal (Tr. p. 96). This cookhouse consisted of a kitchen and dining room in a building separate and apart from the other buildings of appellant. Appellant's employees were permitted, but not required, to use the facilities of the cookhouse. Meals were sold to them at fixed rates and the cost thereof was deducted from their wages. The cookhouse was also used by employees of logging companies under contract with appellant, by employees of some of the independent companies operated at Glenwood, and by members of the public. The greater proportion of appellant's employees did not use the facilities of the cookhouse. For example, during a typical month in which appellant employed 302 persons, 217 men regularly used the cookhouse at Glenwood, but of these only 110 were employees of appellant (including 18 cookhouse employees), 101 were employees of logging companies under contract with appellant and 6 were employees of independent businesses not connected with appel-

lant. During the same typical month, 302 meals were served to strangers and 192, or 60 per cent of the employees of appellant, did not use these cookhouse facilities at all (Tr. pp. 74, 75). Most employees ate at their homes, either at Glenwood or in the surrounding towns (Tr. pp. 96, 97). There was an independently owned hot dog or sandwich place at Glenwood (Tr. p. 95). Since the complaint was filed appellant has discontinued operating the cookhouse, and has leased it to an independent contractor, who is now operating it (Tr. p. 99).

The cookhouse at Camp 2 was located approximately 17 miles southwest of Glenwood on appellant's logging railroad. It consisted of a kitchen and dining room in a building separate and apart from other buildings of appellant. The facilities of this cookhouse are used by substantially all of appellant's employees at Camp 2. No employees are required to eat there and some employees occasionally go back to Glenwood, 17 miles away, for their meals. There is another independently owned cookhouse about two miles from Camp 2, to which anyone at Camp 2 could go, but there was no evidence that anyone had (Tr. p. 100). The cookhouse at Camp 2 is also used by employees of contractors of appellant and by the few

members of the public who come to Camp 2 (Tr. p. 75).

Appellee and the assignors of appellee worked at Glenwood and later at Camp 2. They were employed as baker, dishwasher, helper and second cook in both cookhouses (Tr. pp. 76, 77). These employees were paid by the month and worked more than the maximum hours prescribed by the Act.

No controversy is presented to this court, either by this appeal or by the cross-appeal, with respect to the hours worked by appellee and his assignors or as to the amount of overtime due them under the Fair Labor Standards Act, if it be found applicable to them.

SPECIFICATION OF ERRORS

I.

Employees in logging camp cookhouses are not engaged in the production of goods for commerce within the meaning of Section 7 (a) of the Fair Labor Standards Act, and the District Court therefore erred in making its Conclusion of Law No. 1 that such work constituted production of goods for commerce within the meaning of said section.

II.

A logging camp cookhouse located at an isolated point is a retail or service establishment within the meaning of Section 13 (a) (2) of the Fair Labor Standards Act, and the District Court therefore erred in making its Conclusion of Law No. 2 that the employees in such a cookhouse are not engaged in a retail or service establishment the greater part of whose selling or servicing is in intrastate commerce.

III.*

If the cookhouse at Glenwood is a retail or service establishment within the meaning of Section 13 (a) (2) of the Fair Labor Standards Act, then the District Court did not err in finding that the employees of the cookhouse at Glenwood were exempt under the provisions of Section 13 (a) (2) of said Fair Labor Standards Act.

*NOTE: This point is raised by the Statement of Points filed by the appellee on the cross-appeal, is not a specification of error on the part of the appellant, and is technically the specification of error of appellee on the cross-appeal.

ARGUMENT

I.

Employees in a logging camp cookhouse are not engaged in the production of goods for commerce within the meaning of Section 7 (a) (2) of the Fair Labor Standards Act.

The Fair Labor Standards Act applies to employees and not to employers—that is, the test in this and in any other case arising under the Act is whether the employee, and not the employer, is engaged in commerce or the production of goods for commerce. The language of Sections 6 and 7 of the Act is clear and its meaning unequivocal. The language is

“(a) Every employer shall pay to each of his employees who is engaged in . . . production . . .”
and

“(a) No employer shall . . . employ any of his employees who is (are) engaged in . . . production . . .”

The question here is whether appellee and the assignors of appellee were engaged in commerce or in the production of goods for commerce within the meaning of the Act.

The answer to the foregoing question therefore depends upon the interpretation and application of the

definition of “produced” as set forth in Section 3 (j) of the Act. This section defines “produced” as meaning:

“‘Produced’ means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.”

The definitive words “produced, manufactured, mined, handled, or in any other manner worked on in any State,” standing alone, would require physical contact with the goods. The description of employees engaged in production is stated subordinately to these definitive words. The descriptive phrase “or in any process or occupation necessary to the production thereof, in any State” must be construed in the light of the definition of “produced” and the constitutional limitation on the authority of Congress under the commerce power.

The United States Supreme Court has said Congress may regulate intrastate business only if it “is so directly and immediately connected with such busi-

ness (interstate business) as substantially to form a part or necessary incident thereof." *New York Central R. R. Co. v. Carr*, 238 U.S. 260. This rule has been affirmed in the most recent decisions of the United States Supreme Court.

U. S. v. Darby, 312 U.S. 100, 61 S. Ct. 451, 85 L. Ed., 132 A.L.R. 1430;

Consolidated Edison Co. et al. v. N.L.R.B. et al., 305 U.S. 197, 222, 82 L. Ed. 126;

Santa Cruz Fruit Packing Co. v. N.L.R.B., 303 U.S. 453, 466;

N.L.R.B. v. Jones & Laughlin Steel Corporation, 301 U.S. 1, 81 L. Ed. 601, 57 S. Ct. 615.

The Supreme Court in the *Jones & Laughlin Steel Corporation* case said (p. 624):

"Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. The question is necessarily one of degree."

The rule of these recent decisions conclusively shows the necessity of limiting the scope and coverage of the Act. The intent of Congress to adhere

strictly to this principle is evidenced by the definitive words of Section 3 (j), and due regard must be given to the rule of constitutional law and the congressional intent in defining the meaning of "necessary to production."

When "necessary" is used in a statute, the courts have attributed a flexible meaning to it. It is said to express a degree of relationship. As used in Section 3 (j) of the Fair Labor Standards Act of 1938, "necessary" therefore means a degree of relationship to production.

The United States Supreme Court has defined that relationship. The language of the Act can be paraphrased to express that degree of relationship more clearly. So paraphrased, it would read as follows:

Any work or occupation which is so closely, substantially and directly related to production as to form a part or necessary incident of production.

It therefore follows that the work done by an employee to fall within the definition of "produced" (F.L.S.A. of 1938, Sec. 3 (j)) must be work that is within the process of production or so directly related to the process of production as to form a part or indispensable incident thereof.

It is submitted that appellee and his assignors, who were employed in the cookhouse as baker, dishwasher, helper and second cook, were not engaged in the process of production, nor was their work so directly related to the process of production as to form a part or necessary incident thereof. Appellee and his assignors did not manufacture, handle, or in any other manner work on the logs. They prepared and served food to such of appellee's employees as cared to make use of the cookhouse facilities. Indeed, it is difficult to conceive of a more classic example of a business or establishment that provides daily necessities of life to individuals than a restaurant, which, after all, is what a cookhouse is, even though logging jargon requires the use of a more plebeian word.

The argument that cookhouse or restaurant employees are engaged in production or an occupation necessary thereto is, in short, that employees are necessary to produce logs, food is necessary to continued life and strength of employees, and therefore those who prepare and serve the food to employees are engaged in production or work necessary to production. Certainly loggers must eat but by the same logic it could be argued that in order to cook and serve the food, it must be secured from a grocer, who in turn secures it from the farmers, who in turn must

grow it from seeds purchased from the seed store; therefore, the grocer, the farmer and the seed store man are engaged in production because without them food could not be provided to the loggers and the loggers could not fell and buck logs without food.

No decision that has been cited, or that could be cited, has ever extended the concept of interstate commerce to this length. Indeed, such a holding would "effectually obliterate a distinction between what is national and what is local and create a completely centralized government." The United States Supreme Court in the *Jones & Laughlin Steel Corporation* case said this could not be done in the light of our dual system of government.

The distinction must be drawn between that which may be necessary to the operation of a business in all its phases and that which is necessary to production. The coverage of the Act is limited to work which is a part of production. Providing necessities of life to employees is not directly related to production. This is particularly true where the employees are free to use or not to use the facilities for securing these necessities which are made available to them by the employer.

Ownership, control or management of the cookhouse by the employer is not the test. If the cookhouse were independently owned and operated, it could not be successfully contended that its employees were engaged in commerce nor in the production of goods for commerce because its patrons earned their living and supported their families by working for an employer whose goods or a portion thereof ultimately moved in interstate commerce. If the employees of an independently owned restaurant or cookhouse whose patrons earn their living by working for an employer whose goods move in interstate commerce are held to be covered by the Wage and Hour Law, the distinction between what is local and what is national is completely obliterated. The result is shocking. A completely centralized federal government is established. This must not be done. Yet, if the cookhouse owned by the employer who is also engaged in the business of producing goods for commerce is held to be covered and the independently owned cookhouse or restaurant is held not to be covered, then the test necessarily applied to reach this conclusion is the test of ownership of the cookhouse or restaurant. The language of Section 6 (a) and Section 7 (a) of the Fair Labor Standards Act of 1938 precludes the using of this test.

The cookhouse or restaurant is an adjunct to the principal business of logging. It is operated as a convenience to the employees. It is operated on a non-profit basis. Salaries and wages paid cookhouse or bunkhouse employees do not represent a cost of production. It cannot be said that an employee whose wages are not a part of the cost of production is engaged in production.

The court below relied on *Philadelphia, Baltimore & Washington Railroad Co. v. Smith*, 250 U. S. 101, 39 S. Ct. 396. This was a decision of the Supreme Court of the United States holding that a cook in a railroad camp car was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. In that case plaintiff was cook for a gang of railroad bridge carpenters employed in repairing a bridge which, in itself, was an instrumentality of interstate commerce. The Supreme Court held:

“... it of course is evident that the work of the bridge carpenters in the present case was so closely related to defendant's interstate commerce as to be in effect a part of it. The next question is, what was plaintiff's relation to the work of the bridge carpenters? *It may be freely conceded that if he had been acting as cook and camp cleaner or attendant merely for the personal convenience of the bridge carpenters, and without regard to the conduct of their work, he could not properly*

have been deemed to be in any sense a participant in their work. But the fact was otherwise. He was employed in a camp car which belonged to the railroad company, and was moved about from place to place along its line according to the exigencies of the work of the bridge carpenters, no doubt with the object and certainly with the necessary effect of forwarding their work, by permitting them to conduct it conveniently at points remote from their homes and remote from towns where proper board and lodging were to be had. . . . The significant thing, in our opinion, is that he was employed by defendant to assist, and actually was assisting, the work of the bridge carpenters by keeping their bed and board close to their place of work, . . . Hence he was employed, as they were, in interstate commerce, within the meaning of the Employers' Liability Act." (*Italics supplied.*)

The cook in the camp car was employed by a common carrier. The car was operated over the lines of an interstate carrier. The bridge gang worked at various points along the lines of the interstate carrier. The bridge gang had no permanent place of work. When working at remote points the railroad company, in order to carry on maintenance and repair work efficiently, provided a camp car. At the time of the injury suffered by this cook the bridge gang was working at a point remote from other eating and lodging facilities. In the circumstances, the work of the

cook on the camp car was necessary to, and was a part of, the work of the bridge crew.

The case of *Philadelphia, Baltimore & Washington Railroad Co. v. Smith*, supra, is distinguishable on the facts from the case involving logging camp cookhouse employees. The logging camp cookhouse comes within the exception stated by the court in the *Smith* case, to wit:

“It may be freely conceded that if he had been acting as cook and camp cleaner or attendant merely for the personal convenience of the bridge carpenters, and without regard to the conduct of their work, he could not properly have been deemed to be in any sense a participant in their work.”

The loggers have a permanent place of employment. They are not required to use the cookhouse facilities; indeed, many do not. It is practical and possible for many to commute between their homes or other places affording lodging and boarding facilities and their work. The cookhouse is not maintained, as the United States Supreme Court said in the *Smith* case, “with the necessary effect of forwarding” the work of the loggers. It was maintained as a matter of convenience to the employees of appellant who cared to make use of its facilities. Obviously, restaurants independently owned could not, and would not, follow

bridge gangs from place to place on the lines of an interstate carrier if that carrier did not provide board and lodging facilities. On the other hand, an independently owned restaurant might well be opened at or near a logging camp employing, as appellant does here, several hundred men, if the logging company did not provide board and lodging facilities for the convenience of its employees.

The Glenwood cookhouse (involved in the cross-appeal) was located at a distance from the actual logging operations and used by well under half of appellant's employees, and was used by many who were not employees of appellant at all. It is submitted that in those circumstances these cookhouse employees bore no more intimate relation to the work of appellant's other employees than would the employees of any privately owned restaurant or boarding house which those employees might have used, and, indeed, which they have used since the Glenwood cookhouse was turned over to an independent entrepreneur. Appellant was, in effect, operating a restaurant at Glenwood, as it might have operated a grocery store or (as has been done) a school for the loggers' children. No doubt it was a facility provided for the *convenience* of appellant's employees, but their use of that facility was not required nor was it necessary, as is demon-

strated by the fact that in a typical month only 92 loggers out of close to 300 employed by appellant used those facilities. It is submitted, therefore, that as to the cookhouse at Glenwood, the work carried on there did not in any respect constitute the production of goods for commerce.

The cookhouse at Camp 2, while situated 17 miles from Glenwood and used by substantially all of appellant's employees, was not the only practical facility available to loggers employed at Camp 2. There was and is another independently owned restaurant or cookhouse, about 2 miles from appellant's Camp 2, to which anyone at the camp could go. Furthermore, appellant's employees were free to, and some occasionally did, go back to Glenwood, 17 miles away, for their meals. Appellant's cookhouse at Camp 2 was also used by employees of independent contractors and such members of the general public who come to Camp 2. Furthermore, any employee who preferred to cook his own food was free to do so.

It is submitted that in this case the cookhouse employees were not a part of the logging crew and "actually assisting" them in their work. In view of the factual differences between the *Smith* case and this case we further submit that the decision in the *Smith* case is not controlling here.

It is submitted, therefore, that the employees here in question were not engaged in the production of goods for commerce as that phrase is used in Section 7 (a) of the Fair Labor Standards Act.

II.

Employees in a logging camp cookhouse are exempt from the provisions of Section 7 (a) of the Act because said employees are engaged in a retail or service establishment the greater part of whose selling or servicing is in intrastate commerce as provided by Section 13 (a) (2) of the Act.

The exemption provided for in Section 13 (a) (2) of the Fair Labor Standards Act is applicable to logging camp cookhouse employees. Section 13 (a) provides, so far as here relevant, as follows:

“The provisions of sections 6 and 7 shall not apply with respect to . . . (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; . . .”

To determine whether or not the employees here in question fall within this exemption, three tests must be satisfied. (1) They must be engaged in some *retail* or *service* trade, (2) they must be employed in an *establishment*, and (3) the greater part of their work must be in *intrastate commerce*.

We shall therefore examine each of these three prerequisites to determine whether or not appellee and his assignors fall within it.

1. A logging camp cookhouse is a retail or service concern.

A restaurant is almost the classic example of a service establishment, for what is sold is not only food, but the service of food and the use of facilities for eating. Thus, in *City and County of San Francisco v. Larsen*, 165 Cal. 179, 131 Pac. 366, a restaurant was held not to be exempt from a license ordinance containing a clause exempting any person "who sells or manufactures goods, wares and merchandise." The restaurant argued in this case that it was selling food, but the court said:

"A restaurant keeper is not, according to ordinary usage, either a merchant or a manufacturer. The fact is that both the sale and the manufacture of food are mere minor incidents to the keeping of a restaurant. A restaurant is, primarily, a public eating place."

The Administrator of the Act has consistently so ruled. We quote from Interpretative Bulletin No. 6 issued by the Administrator in June, 1941, but the language which we quote was also included in the Interpretative Bulletin issued in December, 1938:

“22. The term ‘service establishment’ as used in section 13 (a) (2) may be considered to include generally that large miscellaneous assortment of business enterprises which are similar in character to retail establishments, but which may not be accurately classified as such. . . .

“23. . . . Service establishments are usually local in character, are usually open to the general consuming public and usually render a service to private individuals for direct consumption. The service is usually purchased in small quantities for private use rather than for industrial and business purposes. Further, the service is usually rendered at a ‘retail’ price.

“24. Typical examples of service establishments akin to retail establishments, within the meaning of the exemption are: Restaurants; cafeterias; roadside diners; hotels; . . . These establishments operate in the same manner as retail establishments and have substantially the same attributes. The principal difference is that their revenue is derived primarily from the sale of service instead of from the sale of merchandise.”

This point, however, need be labored no further for if a restaurant (and a cookhouse is the same thing) is not a service establishment it must be a retail “establishment” for it sells its food and service to the ultimate consumer.

2. A logging camp cookhouse is an establishment.

The word "establishment" is defined in Webster's Unabridged Dictionary, Second Edition, as:

"1. Act of establishing, or state or fact of being established; . . .

2. That which is established; . . . d *The place where one is permanently fixed for residence or business; residence, including grounds, furniture, equipage, retinue, etc., with which one is fitted out; also, an institution or place of business, with its fixtures and organized staff; . . .*"

(Italics supplied.)

Judicially, "establishment" has been held to mean a permanent place where business is conducted. See *Lilley v. Eberhardt* (Mo.), 37 S. W. (2d) 599; *Veazey Drug Co. et al. v. Bruza et al.*, 169 Okla. 418, 37 P. (2d) 294; *McNabb v. Clear Springs Water Co.*, 239 Pa. 502, 87 Atl. 55; 15 Words & Phrases, Perm. Ed., p. 177 et seq.

The Interpretative Bulletins issued by the Administrator have accepted this definition, and we quote again from Interpretative Bulletin No. 6:

"33. . . . The word 'establishment' as used in section 13 (a) (2) ordinarily means a physical place of business. . . .

"34. The term 'establishment' is not synonymous with the words 'business' or 'enterprise' as applied to multi-unit companies. Thus, for

example, a manufacturing company which has its own retail outlets operates a number of separate and different types of establishments. Each physically separated place of business must be considered as a separate establishment, and the applicability of the exemption depends upon whether the particular establishment possesses the characteristics of a retail or service establishment.”

It was contended in the court below that to hold that a cookhouse was an establishment would be holding, in substance, that the employer was engaged in the restaurant business as well as the logging business, but there could be nothing anomalous in so holding. Most business enterprises are engaged in more than one business and there is nothing unusual or peculiar in finding that a logging company is also engaged in running a restaurant. Many logging companies not only run restaurants, but also run hotels for the general public, gasoline stations, power companies, schools, churches, and numerous other things.

3. The work in a logging camp cookhouse is intrastate in character.

Obviously, the food served in a cookhouse such as that operated by the appellant is made, consumed and served in the cookhouse and there is no interstate flavor, as it were, to the service. No element of the

work done, or the service performed, or the sales made, in appellant's cookhouses took place outside the State of Oregon, or, indeed, outside two counties in Oregon. Once more we refer to Interpretative Bulletin No. 6, where in discussing the "intrastate commerce requirements" of this particular provision, the Administrator has said:

"45. Selling or servicing is in intrastate commerce if no element of the particular transaction takes place outside the state in which the establishment is located. . . ."

It is submitted, therefore, that a logging camp cookhouse is a service establishment the greater part of whose selling or servicing is in intrastate commerce, and that its employees are therefore exempt from the provisions of the Act.

The court below, in considering this question, used language on which we cannot improve and therefore must quote:

"There are several factors pertinent to each of these establishments. A cookhouse is a restaurant or roadside diner and, therefore, a typical service establishment. A service was rendered in a physically separate establishment where meals were sold at retail to, and the facilities of the establishment were placed at the disposal of, private individuals for direct consumption and use. Persons

not in the employment of defendant or companies under contract with defendant were served upon the same terms as persons so employed, except that the price was higher for the former. Employees of logging companies under contract with defendant were served. There was no requirement that defendant's employees patronize either cookhouse. Those employees who were served in the cookhouse were charged a price for the meals eaten, which in the aggregate sustained the establishment but was not above cost. These payments were deducted from the employees' wages.

“Obviously, if either of these cookhouses were operated by an entirely independent concern, it would be designated as a restaurant and would fall in the class of a retail or service establishment. Such a restaurant would do the majority of its selling or servicing in intrastate commerce, irrespective of the fact that meals were sold to the employees of one company only. This factor highlights a fundamental problem. The timber worker is a member of the public. As to meals, he is himself a consumer and purchases food at retail as any other member of the consuming public. This is true whether he is employed or unemployed. The fundamental characteristic of a restaurant is sale at retail to the ultimate consumer in intrastate commerce.

“But in this case one circumstance should establish the cookhouses as service establishments. The employees in the woods and the union stipu-

lated that these should be operated at cost and should be self-sustaining. Clearly, the employees actually producing goods for commerce recognize thereby that the cookhouses are maintained for their service and convenience. Under this clause, the burden of any increased wages to cookhouse employees would fall upon those who were engaged in producing goods for commerce. The latter are not required to patronize the cookhouse but it is there for their service if they so desire." (Tr. pp. 64, 65.)

But the court below, feeling bound by the rulings of the Administrator set forth in the revised issue of Interpretative Bulletin No. 6, held that the Glenwood cookhouse (involved in the cross-appeal) would fall within the exemption, but that the Camp 2 cookhouse (involved in this appeal) would not. We must, therefore, now consider the two cookhouses separately and consider further the effect of the Interpretative Bulletin.

4. The Camp 2 cookhouse.

The Camp 2 cookhouse (involved in this appeal) was isolated and it was, for practical purposes, the only means for the employees to eat at Camp 2.

From these facts it has been urged, first, that the Camp 2 cookhouse was necessary for the production of goods for commerce and that the work in the cook-

house constituted production of goods for commerce under Section 7 (a) and, second, that therefore such work could not be exempt under Section 13 (a) (2). This argument, it is submitted (and it is the argument embodied in the reissue of Interpretative Bulletin No. 6 which we will discuss hereafter), goes too far.

Sections 6 and 7 (the minimum wage and maximum hour provisions) of the Fair Labor Standards Act apply to all employees engaged in commerce or in the production of goods for commerce. Section 13 (a) (2) exempts from Sections 6 and 7 such employees as are engaged in service establishments the greater part of whose selling or servicing is in intrastate commerce. Necessarily, therefore, Section 13 (a) (2) exempts from Sections 6 and 7 certain employees who are in fact engaged in the production of goods for commerce. Otherwise there can be no meaning to Section 13 (a) (2), for if Section 13 (a) (2) does not apply to persons engaged in the production of goods for commerce, it does not apply to anyone. This is recognized by Interpretative Bulletin No. 6, wherein it is said:

“4. . . . Unless an employee is engaged in interstate commerce or in the production of goods for interstate commerce, sections 6 and 7 are not applicable and accordingly it becomes un-

necessary to ascertain whether section 13 (a) (2) affords an exemption. . . .”

It follows, we submit, that the fact—if it be a fact—that the work performed by cookhouse employees at Camp 2 was necessary to the production of goods for commerce provides no grounds for holding that the exemption is not applicable.

This logically brings us to a discussion of the rulings of the Administrator which the court below found binding. The present ruling of the Administrator applicable to this situation is as follows (Interpretative Bulletin No. 6, p. 12):

“40. On the other hand, in many cases, section 13 (a) (2) does not apply since the facilities furnished serve merely to facilitate or make possible the continued operation of the principal business of the company. In these cases the employer does not operate an adjunct which is unrelated to the principal business but the furnishing of the facilities is an integral part of the principal operations. The employer does not satisfy the wants of the employees as part of the general consuming public. Deductions for these facilities are normally made from the cash wages received by the employee. The facilities are not made available to the general public. In these cases, there will not be a separate retail or service establishment within the exemption. Thus, for example, isolated lumber and mining camps oper-

ate cookhouses and bunkhouses for employees. These cookhouses and bunkhouses do not serve the general public but are an integral part of the lumber or mining operations. Frequently, deductions are made from the wages of employees for the facilities furnished. The cookhouses and bunkhouses are not adjuncts which are unrelated to the business of lumber or mining. They are as much a part of the principal business as the tool sheds. Failure to provide the facilities would make continued operations difficult. Further, the furnishing of such facilities is not carried on in the same manner as the operations of commonly recognized retail or service establishments. In our opinion, therefore, cookhouses and bunkhouses may not be considered as separate retail or service establishments for purposes of the exemption. Similarly, employees working on a traveling commissary or camp car which goes along with the working construction crew on a railroad or telegraph right-of-way are not engaged in a retail or service establishment for purposes of the exemption. No distinction can be drawn between the employee who sharpens the tools for the men in the gang and the employee who cooks their meals, washes their dishes, or makes their beds."

Under the language of the paragraph we have just quoted, there can be no question but that the work in the Camp 2 cookhouse is not within the exemption provided by Section 13 (a) (2), but we submit that the language of paragraph 40 which we have quoted is

not binding on the court and does not correctly state the law.

First, as to the binding effect of the regulations, we submit that the court below has erred in holding that the ruling embodied in the quoted paragraph was "a permissible one under the language of the statute." The function and the effect of these Interpretative Bulletins issued by the Administrator under the Fair Labor Standards Act are not subjects of doubt. They are certainly entitled to weight and to the consideration of the court, but with equal certainty they do not have the force of law and are not binding on the court.

The Supreme Court of the United States has said of the Interpretative Bulletins issued by the Administrator of the Wage and Hour Division that:

"... In any case such interpretations are entitled to great weight. This is peculiarly true here where the interpretations involve 'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new. . . .'" *U. S. v. American Trucking Ass'ns.*, 310 U. S. 534, 549, 60 S. Ct. 1059, 1067.

To the same general effect see *U. S. v. Jackson*, 280 U.S. 183, 50 S. Ct. 143; *Maryland Casualty Co. v. U. S.*, 251 U. S. 342, 40 S. Ct. 155.

But it has never been suggested by any court that the Interpretative Bulletins issued by the Administrator are binding, and that is recognized in Interpretative Bulletin No. 6 itself, where it is stated (par. 2):

“... This bulletin is merely intended to indicate the construction of the law which will guide the Administrator in the performance of his administrative duties until he is directed otherwise by the authoritative ruling of the courts or until he shall subsequently decide that his prior interpretation is incorrect.”

In considering the weight that should be given to paragraph 40 of Interpretative Bulletin No. 6, attention should be called to the fact that the Administrator has changed his ruling on two different occasions on this very subject. The original ruling (3 Wage and Hour Reporter 363) was that employees in an isolated logging camp cookhouse were not within the exemption, and later the Administrator ruled that such employees, and employees in similar situations, were exempt. (See the letter of Administrator Fleming, dated August 8, 1940, Tr. p. 36, and the letter of Assistant Solicitor Poole, dated August 10, 1940, Tr. p. 43; see also 2 C. C. H. Labor Law Serv-

ice, pars. 25551.61, 25551.6111 and 25551.612.) And, finally, the Administrator's present ruling quoted above is that they are not exempt. The Fair Labor Standards Act has not been amended. The Administrator reserves the right to change his rulings at any time and it certainly can not be suggested, as the court below seems to suggest, that those rulings at any time will be binding and have the force of law simply because they are within the permissible scope of what the Administrator might reasonably determine from the facts. The reasoning of the court below would have required a decision in favor of appellant on this point had the decision been rendered prior to the re-issuance of Interpretative Bulletin No. 6 in June, 1941, and a change of that decision afterwards, although the law was the same and the facts were the same and only the Administrator's mind had changed. The Administrator cannot change the law by changing his mind and, whatever the law is, that it has been since the Act was enacted.

Indeed, we may point out that if an interpretation of the Administrator is entitled to great weight, as it is, then this principle is applicable to each of the conflicting interpretations, and there is no reason known to us why the latest interpretation should be entitled to greater weight than the earlier one.

Concededly, however, the opinions of the Administrator are entitled to weight no matter how many times he changes them, but we submit that the weight to which they are entitled becomes less with each change of mind. In the final analysis, the rulings of the Administrator must stand or fall on their own merits.

Therefore, we will now proceed to discuss the ruling embodied in paragraph 40 on its merits. The argument embodied in paragraph 40 of Interpretative Bulletin No. 6 is, in substance, that where the cook-house or other facilities are operated as an adjunct (or, as one might say, as a convenience) to the principal business of the employer, they may be considered as falling within the exemption, but where the facilities are operated as an integral part of the business of the employer (or, as one might say, as a necessity) they are not exempt. With due deference, it seems to us that this line of reasoning is tantamount to holding that if an employee of such an establishment is engaged in the production of goods for commerce, he does not come within the exemption clause, which renders the exemption clause utterly meaningless.

If a restaurant is a service establishment—and the Administrator concedes that it is—it does not become

less a service establishment by becoming isolated, nor does it become less a service establishment because it is necessary for the carrying on of some other business. After all, all men must eat somewhere and we can find no justification, either in the language of the Act or in the spirit of the Act, for making isolation and necessity the test of whether it does or does not apply. We submit that enforcement of the Act would become extremely difficult and, indeed, the exemption rendered practically nugatory if such amorphous tests are to be used.

A "parade of horrors" is perhaps a faulty method of argument, but it is useful to illustrate the pitfalls into which the use of such tests would inevitably lead. Suppose that in the vicinity of the Camp 2 cookhouse there were two or three independently operated restaurants, indistinguishable from restaurants located in any other place. Not one of these restaurants could be considered as necessary to the prosecution of the work. However, the three of them together would certainly be so considered for without eating facilities the operations could not be carried on. The test of isolation would be applicable to each were it not for the other two, and so would the test of necessity. Under the Interpretative Bulletin as it now stands, such operations would be within the exemption clause of Sec-

tion 13 (a) (2), but would not be so exempted if two of the three restaurants shut down.

If a logging camp cookhouse is a service establishment (and we think it has conclusively been shown to be such), the fact that it is isolated, or the fact that it is necessary to the carrying on of the business, can make it no less so. Particularly is this true if we start with the assumption, as we must, that the exemption provision applies only to employees who are engaged in the production of goods for commerce. If the work in the cookhouse was simply an "adjunct" or a convenience rather than a necessity, the employees would not be engaged in the production of goods for commerce at all under Section 7, and Section 13 (a) (2) does not come into play until it is found that such work is necessary for the production of goods for commerce.

We submit, therefore, that in paragraph 40 of Interpretative Bulletin No. 6 the Administrator of the Act has fallen into a logical error, for while admitting in paragraph 4 of the Bulletin that the exemption in Section 13 (a) (2) applies only to those engaged in the production of goods for commerce within Section 7, he argues in paragraph 40 that because the work performed by the employees in question was necessary for the production of goods for commerce, it is an

integral part of the employer's business and within Section 7, and that therefore the exemption does not apply.

Indeed, with respect to paragraph 40, we can do no better than to quote the criticisms made of the Administrator's ruling by the court below:

"The interpretation is subject to criticism on several bases. First, a service establishment does not change its character even if it is in an isolated spot and of great practical convenience to the employer. Second, the employees of defendant and employees of companies under contract with defendant are the 'general public' here, purchasing goods and service at retail, even though the price is deducted from their wages. Third, the skilled workers producing goods for commerce are subjected to a greater burden than they would be if working in a settled community, since the cookhouse is to be self-sustaining for the benefit of workers. Fourth, if the employer were to allow an independently controlled establishment to operate a cookhouse here, the skilled worker would pay retail prices at a higher scale and could not longer exercise an influence on the conduct of the cookhouse. Fifth, the policy should be to encourage employers to operate service establishments, such as gasoline filling stations, swimming pools and beauty parlors at cost to the employees, in order to increase the satisfaction of employees at isolated camps and assist in producing goods for commerce.

“Influenced by such considerations, the Administrator has previously taken an opposite position. During the pendency of this case and owing apparently to developments in this controversy, the former ruling was repudiated, notwithstanding the fact that certain courts had made the previous pronouncement the basis for decision. *Labates vs. The Interstate Company*, opinion January 29, 1941, Western District Tennessee, Western Division.” (Tr. pp. 58, 69.)

We submit that the reasoning of the District Judge is sound and requires a reversal of the ruling of the Administrator in this regard, but the District Judge, while feeling that the Administrator was wrong, curiously decided, in effect, that he was “permissibly” wrong. But there is no area of permissible error allowed to an administrative official in interpreting a statute. The Administrator’s opinion must be, and should be, given great weight. The detailed consideration given to it by the District Judge shows that he gave it great weight, but if that ruling seems, as it seemed to the District Judge, to be an incorrect ruling under the law as it stands, then it should not be followed.

The cogent criticisms of the District Judge with respect to the ruling of the Administrator are, we believe, unanswerable and he should have refused and

this court should therefore refuse to be bound by the Administrator's ruling after having given to it the weighty consideration which it deserves.

The employees of a logging camp cookhouse are employed in a service establishment the greater part of whose service is in intrastate commerce. The establishment is no less a service establishment and the service they perform is no less intrastate in character because without it an interstate enterprise would have difficulty in running.

It is respectfully submitted, therefore, that the trial court erred in holding that the employees in the Camp 2 cookhouse were not exempt under Section 13 (a) (2) of the Act and that his ruling in this regard should be reversed.

5. The Glenwood cookhouse.

The Glenwood cookhouse (involved in the cross-appeal), as the undisputed facts show, was not an isolated cookhouse. It was used by less than half of appellant's employees. Most of its use was by employees of independent companies with contractual relations with appellant, but a substantial part of its use was by members of the public. There are other eating facilities in and near Glenwood. The Glenwood cookhouse

was at one time operated and is now being operated as an independent enterprise (Tr. pp. 98, 99).

Because the Glenwood cookhouse is not isolated, and because it is used to a substantial extent by the public and by others than employees of appellant, paragraph 40 of Interpretative Bulletin No. 6 is not applicable, but paragraph 39 of Interpretative Bulletin No. 6 is applicable. We quote:

“39. Many concerns provide facilities for their employees. In some cases a company operates in its factory a cafeteria or store which is physically separated from the remainder of the plant and is conducted in the same manner as commonly recognized retail or service establishments which are not affiliated with the company. In these cases, the goods or services are sold for cash to the employees, and the store is normally open to the general consuming public. The employer caters to the needs and wants of the employees viewed as part of the general consuming public and not merely as employees. Thus, a company may sell at regular retail prices a general line of merchandise such as clothing, athletic equipment, etc., to its employees in the same manner as independent merchants. In our opinion such a physically separated place of business may be considered as a retail or service establishment separate and distinct from the nonretail plant of the employer.”

At this point we must confess to difficulty in finding the distinction that divides the company restaurant or cookhouse held exempt in paragraph 39 from that held not to be exempt in paragraph 40, except to the extent that the paragraph 39 cookhouse, as it were, is patently a convenience to employees rather than a necessity. But, assuming that the distinction is valid, there can be no dispute that the Glenwood cookhouse falls under paragraph 39.

Utterly aside from the regulations as they now stand, it must be obvious that the employees at the Glenwood cookhouse were engaged in a service establishment the greater part of whose service was in intra-state commerce, and that they are therefore exempt from the provisions of Sections 6 and 7 of the Fair Labor Standards Act. The evidence is clear that this cookhouse was not an integral part of appellant's main business, and the evidence is also clear that the operation of the Glenwood cookhouse was in no sense necessary to the carrying on of its logging operations. Most of appellant's employees lived at their own homes or boarded in the vicinity and did not use the cookhouse at all. All readily could have done so, though it would have been less convenient. There was a lunch counter or restaurant in the village which was available to the employees and, as the District

Judge pointed out, it could have been expanded at any time to take care of all of them. The cookhouse had previously been operated as an independent business and appellant had assumed its operation only at the request of the union because the union thought that the rates were too high. Since the complaint was filed in this case the cookhouse at Glenwood has again been leased to an outsider and is being carried on as an independent enterprise.

Furthermore, in an average month over three hundred meals were sold to members of the public, an average of about ten a day. The facilities of the cookhouse were availed of by the unmarried employees of mills in Glenwood with which appellant had no connection and by the employees of logging companies who were doing work under contract with appellant. This use by others than the employees of appellant far exceeded the use by appellant's employees.

The operation of the Glenwood cookhouse admittedly was a convenience. The employees who used it regularly were presumably unmarried men or men who maintained homes at such a distance from Glenwood that they did not care to try to go back and forth every day. Had the Glenwood cookhouse not been operated, these employees would have had to

make less convenient arrangements or, in the alternative, appellant would have had to employ other loggers who lived in the vicinity and who could take care of their own meals without inconvenience. As the testimony of Mr. Crosby shows (Tr. pp. 97, 98), there was never a time that appellant could not have operated without the Glenwood cookhouse, but it preferred to run the cookhouse, not because it could not get employees without a cookhouse, but because it was the best way to retain some employees appellant desired to retain.

The Glenwood cookhouse therefore falls into the same category as any other cafeteria or restaurant which a firm runs for the convenience of its employees. The members of the court are familiar with many such instances. Banks, power companies, department stores, and many other large enterprises maintain restaurants and cafeterias primarily for the use of their employees, some of which are not used by the public at all. But in such cases no employee is required to use them, many employees do not use them at all, and there is available across the street, or downstairs even, plenty of other facilities for eating. No one would contend that such a cafeteria or restaurant was an integral part of the banking or telephone business, or

that the business could not be operated just as well without it. And that is the case here.

It is respectfully submitted, therefore, that the court below did not err in holding that the employees of the Glenwood cookhouse were exempt under Section 13 (a) (2) of the Fair Labor Standards Act, and that appellee therefore cannot prevail on the cross-appeal.

6. The authorities.

Although there have been a fair number of decisions relating to the scope of the exemption granted by Section 13 (a) (2) of the Fair Labor Standards Act, no decision of any appellate court so far rendered throws any light on the problem which confronts this court on the appeal and the cross-appeal. Decisions involving watchmen, of which there have been several (decided both ways), and decisions involving the moot question as to whether employees of loft buildings do or do not fall within the exemption, are of but limited use to the court here, and that is true of most of the other decisions involving the exemption. The factors requiring consideration here differ to a very substantial degree from the factors which require consideration in the ordinary question of whether a concern is a retail or service establishment. This is evi-

denced by the fact that such cookhouses as are here involved are given separate treatment in the Interpretative Bulletins.

A few decisions rendered by nisi prius courts are, however, more or less directly in point and tend to sustain the position for which we are here contending.

Thus, in *Rivera v. Central Aguirre Sugar Company* (D.C., Porto Rico, 1941), 4 Wage and Hour Reporter 272, 4 C. C. H. Labor Cases, par. 60526, the court had before it a substantially analogous problem. There the Sugar Company maintained a hotel, a golf course and a swimming pool, used by both defendant's employees and the general public. The court held that such employees were not engaged in the production of goods for commerce. In *Labates v. The Interstate Company* (W. D. Tenn.), 4 Wage and Hour Reporter 91, 1 P. H. Labor Service, par. 11977 (for Findings of Fact and Conclusions of Law, see 3 C. C. H. Labor Cases, par. 60331), the court held that employees in a railroad restaurant used by railroad employees, passengers and members of the public, were within the exemption granted by Section 13 (a) (2). In this case the restaurant was not operated by the railroad company. In *Woolfolk v. Orino* (D. C., Or., 1942), 5 Wage and Hour Reporter 132, the court held that the Act did not apply to a cook employed by a highway

contractor, but in this case the court relied on the fact that the highway contractor was engaged in original construction, which, under *Raymond v. Chicago, M. & St. P. Ry. Co.*, 243 U. S. 43, did not constitute interstate commerce. In *Ikola v. Snoqualmie Falls Lumber Company*, 4 Wage and Hour Reporter 470, the Superior Court for King County, Washington, held that cookhouse employees in logging camps are within the Act, but this case was reversed on appeal (*Ikola v. Snoqualmie Falls Lumber Company*, 112 Wash. Dec. 156, 121 P. (2d) 369) on procedural grounds and will have to be tried again.

As far as we can discover, the foregoing are the only adjudicated cases which throw light on the problem which this appeal and the cross-appeal present to the court. The principles of construction which can be culled from the other decisions under the Wage and Hour Act are principles of general application as to which neither the appeal nor the cross-appeal presents any controversy and the citing of which would not assist the court in the problem before it.

Reference should perhaps be made to *Fleming v. Arsenal Building Corporation*, 125 F. (2d) 278, which is one of the loft building cases taking the minority view that employees of such buildings are

covered by the Fair Labor Standards Act. In discussing the exemption provided by Section 13 (a) (2), the court in that case said:

“The ‘service’ being a part of production, the test should be what kind of production it is a part of.”

We take this language to mean that if the “service” (here the serving of foods in logging camps) is part of the production of goods for commerce, then the exemption clause is not applicable. But such an interpretation, as we have pointed out before, successfully reads out of the Act entirely the exemption granted by Section 13 (a) (2). For if the servicing is a part of production, then the exemption would be applicable only if the production were intrastate, and were the production of goods intrastate the Act would not apply anyway. It must be assumed that the framers of the Act intended the exemption to exempt someone, and it can exempt no one if the test used is that adopted by the court in the *Arsenal* case.

7. Conclusion.

This case presents purely a question of statutory construction. The facts are undisputed and the general principles of law applicable to the facts are settled.

We are not unmindful that the Fair Labor Standards Act is a remedial statute and as such should be literally construed, and, similarly, the exemption clause is to be strictly construed under the settled principles of statutory construction. But the exemption clause is not to be construed out of the Act entirely. If it can be given any meaning it must be given meaning in this case.

The problem with which industry is faced in endeavoring to comply with the new standards imposed by this legislation are manifold. But the problems are more or less simple with respect to the vast majority of employees in any enterprise. In any enterprise, however, there are a limited number of employees as to whom the Act creates problems which are vexing, and cooks in logging camps belong to this limited group. These cookhouses are not operated for profit (Tr. p. 34), and in the collective bargaining agreements made between the employers and the unions which represent them, cookhouse employees were excluded from the limitations on hours worked. Both the employers and the unions have therefore explicitly recognized, first, that the cookhouse operation is essentially a service operation and, second, that the cookhouse employees are in a class apart from the other employees. They

must necessarily work at different hours and their work, of course, is of an entirely different nature. In these circumstances, we submit that it is entirely proper that such employees should not be covered by the Act.

And, certainly, as the law was enacted, and as it reads now, cookhouse employees, such as the appellee and his assignors whose work consists solely of serving food, must be regarded as employees of a service establishment the greater part of whose servicing is in intrastate commerce.

Respectfully submitted,

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No. 10048

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

CONSOLIDATED TIMBER COMPANY,
a corporation,
Appellant,

vs.

IVAN WOMACK,
Appellee.

IVAN WOMACK,
Appellant,

vs.

CONSOLIDATED TIMBER COMPANY,
a corporation,
Appellee.

Upon Appeal from the United States District Court
for the District of Oregon.

BRIEF OF CROSS-APPELLANT,
IVAN WOMACK

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JURISDICTION

The jurisdiction to hear the cross appeal is correctly stated by the appellant. It is therefore unnecessary to repeat it.

STATUTES INVOLVED

The cross-appellant adopts the statement of appellant.

STATEMENT OF THE CASE

The case presents for decision really four questions :

(1) Whether cookhouse employees working at a cookhouse some distance from any community (Camp 2) employed by a company engaged in the business of logging are engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938.

(2) Whether cookhouse employees working at a cookhouse at Glenwood employed by a company engaged in the business of logging are engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938.

(3) If such employees at Camp 2 are held to be engaged in the production of goods for commerce within the meaning of the Act, are they exempt under Section 13 (a) (2) of said Act as employees engaged “in any retail or service establishment, the greater part of whose selling or servicing is in intrastate commerce?”

(4) If such employees at the Glenwood cookhouse are held to be engaged in the production of goods for

commerce within the meaning of the Act, are they exempt under Section 13 (a) (2) of said Act as employees engaged “in any retail or service establishment, the greater part of whose selling or servicing is in intrastate commerce?”

The lower court (District Court) held that the employees described in points 1 and 2 “were engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938”, and held that the employees as described in point 3 were not employees engaged in “any retail or service establishment, the greater part of whose selling or servicing is in intrastate commerce.” As to points 1, 2 and 3, the defendant has appealed. The lower court held that the employees described in point 4 were exempt under Section 13 (a) (2). The plaintiff has cross appealed on this point.

By stipulation of the parties and by an order entered by this court, the appellant and cross-appellant were permitted to consolidate their briefs.

Arguments under I and II are technically answering arguments to appellant’s brief, and the argument under III is the opening brief of cross-appellant. We are combining for argument questions 1 and 2 in part I of the argument.

This case raises squarely the coverage of the Fair Labor Standards Act over the two types of cook-houses.

ADDITIONAL STATEMENT OF FACTS

We will not go into the statement of facts at any great length, because practically all the facts are agreed upon in the stipulation set out in the pretrial order. There is also a short, condensed statement of the testimony contained in the transcript. However, there are several facts which have been left out of the statement of facts submitted by the appellant.

The logs purchased from the appellant are manufactured into lumber by the purchaser mills, and in each instance at least 70% of the lumber manufactured from said logs moves in interstate commerce (Tr. 74).

The employees of the independent companies who used the cookhouse at Glenwood were under contract to furnish logs to the appellant, and in some instances, the appellant paid the actual payrolls of these "gyppo" companies (Tr. 97).

Of the 217 men who regularly used the cookhouse at Glenwood, these men were served 3 meals per day for the working days of the month. At Glenwood there was no other practical eating facility at the time when the cookhouse was operated by the appellant. In August, 1940, after the Glenwood cookhouse was closed by the company, a "hot dog" or sandwich place was opened in Glenwood at which ice cream, sandwiches and hot coffee were served, and the proprietor

had approximately 6 stools (Tr. 95 and 96). It was necessary to have the cookhouse at Glenwood operate in order for the defendant to operate (Tr. 100).

The cookhouse at Camp 2 was located approximately 17 miles southwest of Glenwood on the appellant's logging railroad. The cookhouse at Camp 2 is one large building where food is prepared for the men and the bunkhouses are on a sidehill approximately 100 to 200 feet from the cookhouse. Breakfast is served to the men and they eat at the cookhouse. Lunches are furnished them, but they can take them with them, suppers being served at the cookhouse. The only way to get from Glenwood to Camp 2 is by train or speeder, which is owned by the appellant. There is no road to Camp 2, and the trip takes about one hour and 15 minutes. At Camp 2 all the employees eat at the cookhouse, although two or three may go back and forth by speeder occasionally during the week (Tr. 99). The cookhouse at Camp 2 is the only practical facility for eating at Camp 2 (Tr. 75).

SPECIFICATIONS OF ERROR

The District Court erred in finding that the employees of the cookhouse at Glenwood were exempt under the provisions of Section 13(a) (2) of the Fair Labor Standards Act.

This specification is argued in part III of this brief.

ARGUMENT

I

Employees in a logging camp cookhouse are engaged in the production of goods for commerce within the meaning of Section 7(a) of the Fair Labor Standards Act.

We can agree with the statement of the appellant that in determining whether the Fair Labor Standards Act applies, the determination is to be based on whether *employees* are engaged in the “production of goods for commerce”. The Fair Labor Standards Act is remedial law and should be liberally construed.

Fleming v. Hawkeye Pearl Button Co. (C. C. A. 8th, 1940), 113 F. (2d) 52.

Bowie v. Gonzalez (C. C. A. 1st, 1941), 117 F. (2d) 11, at 16.

Robinson v. Larue (Tenn.), 156 S. W. (2d) 433.

The purposes of the Act have been judicially noted from a declaration of policy in Section 2(a) of the Act, and the reports of the Congressional committees proposing the legislation, *U. S. v. Darby*, 312 U. S. 100, 109, 85 L. Ed. 609, 614.

Section 2(a) of the Act sets out the legislative policy to be as follows:

“The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.”

In the *Darby Case*, Justice Stone, speaking for the court, upheld the power of regulation over intrastate commerce where it would affect interstate commerce. As the court points out, Congress has the power to legislate in matters where the goods would eventually be shipped in interstate commerce or would affect interstate commerce. Justice Stone states the power of Congress and the objective of the Fair Labor Standards Act very well, when he states (312 U. S. 123):

“Congress, to attain its objective in the suppression of nationwide competition in interstate commerce by goods produced under substandard labor conditions, has made no distinction as to the volume or amount of shipments in the commerce or of production for commerce by any particular shipper or producer. It recognized that in present day industry, competition by a small part may affect the whole and that the total

effect of the competition of many small producers may be great. * * * The legislation aimed at a whole embraces all its parts."

As noted above, one the purposes of the Act, as set out in Section 2(a)(4), is that substandard conditions lead to labor disputes, which obstruct commerce "and the free flow of goods for commerce". [Note letter of union representative to Wage and Hour Director (Tr. 37).] In connection with this, we can think of no more graphic example as an answer to the question of whether the cookhouse employees are engaged in an occupation necessary for the production of goods for commerce, than to suppose for some reason a labor dispute closed down the cookhouse. There is no question but what that would immediately shut down the whole logging operation and would burden and obstruct commerce. It is common knowledge in the Northwest that the cookhouses and good food are absolutely necessary for the efficient management of a logging camp.

It is admitted in this case that approximately 70% of the appellant's manufactured goods move in interstate commerce, and there is no question that the logs manufactured by the appellant are produced for the purpose of moving in interstate commerce.

"Produced" is defined in Section 3(j) of the Act as follows:

" 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act

an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, *or in any process or occupation necessary to the production thereof, in any State.*" (Emphasis ours.)

The question then is whether the cookhouse employees are in "an occupation necessary to the production" of the logs, which admittedly move in interstate commerce.

"Necessary" in this sense has been very well defined by the court in the case of *Fleming v. Kirschbaum*, 124 F. (2d) 567. The court, in considering whether watchmen, carpenters and porters were necessary for the production of goods for commerce stated (p. 572) :

"Although the services of the watchmen, carpenters and porter are not necessary in the sense of being indispensable they are necessary in that they are both convenient and appropriate to the maintenance of a building suitable for the manufacture of goods for commerce."

The court then cites in a footnote on page 572 :

" 'Necessary' has frequently been construed to mean 'convenient' or 'appropriate.' *McCulloch v. Maryland*, 17 U. S. 316, 413, 4 Wheat. 316, 413, 4 L. Ed. 579; *Legal Tender Cases*, 110 U. S. 421, 440, 4 S. Ct. 122, 28 L. Ed. 204; *Meriwether v. Board of Directors*, 8 Cir., 1908, 165 F. 317, 319; *Getchell & Martin Lumber & Mfg. Co. v. Des Moines Union Ry. Co.*, 115 Iowa 734, 87 N. E. 670, 671; *Brooks v. Chicago, W. & V. Coal Co.*,

234 Ill. 372, 84 N. E. 1028, 1031; *Hutcheson v. Atherton*, 44 N. M. 144, 99 P. (2d) 462, 467.”

(This case is later discussed at length in this brief.)

In *Virginia Railway Company v. System Federation No. 40*, 300 U. S. 515, 81 L. Ed. 789, the United States Supreme Court decided that back-shop employees of a railway company were covered by the Railway Labor Act. In that case the back-shop employees were employed some distance from the railroad where they worked as machinists, boilermakers, etc., in making repairs to locomotives and cars withdrawn from service. When not engaged in making these repairs, the back-shop employees performed “store order work”, which was manufacturing materials such as rivets and repair parts to be placed in railroad stores for use at the Princeton shop and other points on the line.

The United States Supreme Court in that case held that the Railway Labor Act applied to the back-shop employees, and stated (p. 554 U. S.) :

“But petitioner insists that the Act as applied to its ‘back shop’ employees is not within the commerce power since their duties have no direct relationship to interstate transportation. Of the 824 employees in the six shop crafts eligible to vote for a choice of representatives, 322 work in petitioner’s ‘back shops’ at Princeton, West Virginia. They are there engaged in making classified repairs, which consist of heavy repairs on locomotives and cars withdrawn from service for that purpose for long periods (an average of

105 days for locomotives and 109 days for cars). The repair work is upon the equipment used by petitioner in its transportation service, 97% of which is interstate. At times a continuous stream of engines and cars passes through the 'back shops' for such repairs. When not engaged in repair work, the back shop employees perform 'store order work,' the manufacture of material such as rivets and repair parts, to be placed in railroad stores for use at the Princeton shop and other points on the line.

"The activities in which these employees are engaged have such a relation to the other confessedly interstate activities of the petitioner that they are to be regarded as a part of them. All taken together fall within the power of Congress over interstate commerce. *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 619, 55 L. Ed. 878, 883, 31 S. Ct. 621; cf. *Pedersen v. Delaware, L. & W. R. Co.*, 229 U. S. 146, 151, 57 L. Ed. 1125, 1127, 33 S. Ct. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779. Both courts below have found that interruption by strikes of the back shop employees, if more than temporary, would seriously cripple petitioner's interstate transportation. The relation of the back shop to transportation is such that a strike of petitioner's employees there, quite apart from the likelihood of its spreading to the operating department, would subject petitioner to the danger, substantial, though possibly indefinable in its extent, of interruption of the transportation service. The cause is not remote from the effect. The relation between them is not tenuous. The effect on commerce cannot be regarded as negligible. See *United States v. Railway Employees Dept. A. F. L. (D. C.)*, 290 F. 978, 981, holding participation of back shop employees in the nation-wide railroad shopmen's strike of 1922 to constitute an interference with interstate com-

merce. As the regulation here in question is shown to be an appropriate means of avoiding that danger, it is within the power of Congress.

“It is no answer, as petitioner suggests, that it could close its back shops and turn over the repair work to independent contractors. Whether the railroad should do its repair work in its own shops, or in those of another, is a question of railroad management. It is petitioner’s determination to make its own repairs which has brought its relations with shop employees within the purview of the Railway Labor Act. It is the nature of the work done and its relation to interstate transportation which afford adequate basis for the exercise of the regulatory power of Congress.”

We call the court’s attention, particularly, to the quotation that the repair work could be turned over to independent contractors is no answer. The court, as above noted, states in effect that irrespective of whether the work could be turned over to an independent contractor, makes no difference. Certainly then, if back-shop employees of a railroad company, who are engaged in taking care of railroad repairs, which undoubtedly could have been turned over to independent contractors, were engaged in interstate commerce, there is no question that cookhouse crews, who are directly on the premises of the employer and engaged daily in keeping the employees of the employer on the job, are certainly engaged in an occupation “necessary to the production of goods for interstate commerce.” It may be that the Consolidated Timber Company could arrange for an independent

contractor to come in and set up separate cookhouses to be operated independently and for profit. The answer is that the appellant has not done so, just as it has not delegated certain other functions to independent contractors, as it might possibly do.

In the case of *Philadelphia, Baltimore & Washington Railroad Co. v. Alfred Smith*, 250 U. S. 101, 63 L. Ed. 869, the United States Supreme Court held that under the Federal Employers' Liability Act a person who was employed by a railroad company to care for and keep clean a so-called camp car and who attended the beds and cooked for himself and a gang of railroad bridge carpenters quartered in the car was employed in interstate commerce, within the meaning of the Employers' Liability Act, at the time of receiving the injuries in a collision. On page 102 the court states the duties of the plaintiff as follows:

“Plaintiff's principal duties were to take care of this car, keep it clean, attend to the beds and prepare and cook the meals for himself and other members of the gang.”

The only question that was before the court was whether plaintiff at the time he was injured was engaged in interstate commerce, within the meaning of the statute. It was argued by the defendant in this case that because plaintiff was acting as a mess cook and camp cleaner in a camp car belonging to the defendant, which was not moved in interstate commerce, and because plaintiff was injured while engaged in

cooking food which was the property of himself and the carpenters, he was not at that time engaged in interstate commerce. The court disposed of that question very briefly by stating :

“Taking it to be settled by the decision of this court in *Pedersen v. Delaware, L. & W. R. Co.*, 229 U. S. 146, 152, 57 L. Ed. 1125, 1128, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779, that the repair of bridges in use as instrumentalities of interstate commerce is so closely related to such commerce as to be, in practice and in legal contemplation, a part of it, it of course is evident that the work of the bridge carpenters in the present case was so closely related to defendant’s interstate commerce as to be in effect a part of it. The next question is, What was plaintiff’s relation to the work of the bridge carpenters? It may be freely conceded that if he had been acting as cook and camp cleaner or attendant merely for the personal convenience of the bridge carpenters, and without regard to the conduct of their work, he could not properly have been deemed to be in any sense a participant in their work. But the fact was otherwise. He was employed in a camp car which belonged to the railroad company, and was moved about from place to place along its line according to the exigencies of the work of the bridge carpenters, *no doubt with the object, and certainly with the necessary effect, of forwarding their work by permitting them to conduct it conveniently at points remote from their homes and remote from towns where proper board and lodging were to be had.* The circumstance that the risks of personal injury to which plaintiff was subjected were similar to those that attended the work of train employees generally and of the bridge workers themselves when off duty, while not with-

out significance, is of little moment. *The significant thing, in our opinion, is that he was employed by defendant to assist, and actually was assisting, the work of the bridge carpenters by keeping their bed and board close to their place of work, thus rendering it easier for defendant to maintain a proper organization of the bridge gang, and forwarding their work by reducing the time lost in going to and from their meals and their lodging place. If, instead, he had brought their meals to them daily at the bridge upon which they happened to be working, it hardly would be questioned that his work in so doing was a part of theirs. What he was in fact doing was the same in kind, and did not differ materially in degree. Hence he was employed, as they were, in interstate commerce, within the meaning of the Employers' Liability Act.'* (Emphasis ours.)

We think this case completely disposes of the Camp 2 situation. The last three sentences of the above excerpt are especially pertinent to our problem. It is certain, and it is not disputed by the appellant, that it would be impossible to run Camp 2 unless the cookhouse was located near the premises where the men worked. In fact, that is admitted by the stipulation as well as by appellant's witness (Tr. 99). As far as Camp 1 is concerned, there were no practical facilities for eating at Glenwood. As stated above, the only evidence shown on this point was that there was a small lunch counter having six or seven stools, serving only coffee and sandwiches, which all of us as practical people know would not last a logger very long. Despite the statement of appellant's witness,

that it would have been practicable to run the operation without the cookhouse at Glenwood, we are still left in the dark as to what was going to happen to the hundred men who lived and boarded at the Glenwood cookhouse. The testimony shows that there were a number of men who had their families in Portland, and that there were no adequate facilities for the men to drive back and forth to work, and we are not shown any way in which the men could live within a reasonable distance. It seems odd to counsel for cross-appellant that Mr. Crosby was so anxious to reopen the cookhouse at Glenwood.

In the case before us, it is admitted by the appellant (Witness Crosby, Tr. 99) that Camp 2 was necessary for the operation of the logging camp.

Actually, the Glenwood cookhouse comes within the same classification, both by the testimony of the Witness McSorley (Tr. 100), and by the agreed statement of facts. It is to be noticed that there were 110 employees of the appellant eating at Glenwood, and 101 were employees of the "gyppo" loggers who supplied logs to the appellant. There were only 6 employees of independent businesses, and there were only 302 meals served to "strangers". Inasmuch as the "gyppo" loggers were supplying logs to the appellant, whose goods moved in interstate commerce by the stipulation of the parties, the vast majority of the employees who eat at the cookhouse at Glenwood

were employees who were working on goods which moved in interstate commerce.

The figures in the stipulation are somewhat misleading. For instance, 302 meals which were served to "strangers" in the month would only be approximately 4 people, eating 3 meals per day for a month. In other words, the vast majority of the men who ate at the Glenwood camp were men who produced logs for commerce for the appellant and appellant's contractors.

In the case of *Fleming v. Kirschbaum*, 124 Fed. (2) 567, the Circuit Court of Appeals upheld the lower court which held that elevator operators, engineers and firemen employed by an owner who leased his building to tenants, a number of whom manufactured goods which were shipped in interstate commerce, were engaged in "the production of goods for commerce" so as to be entitled to benefit of wage and hour provisions of the Fair Labor Standards Act of 1938, notwithstanding that the engineers and firemen had no actual physical contact with such goods, where their services were so necessary to production by the owner's tenants of goods for commerce as to be indispensable to such production. In that case the Circuit Court of Appeals held that even where the employer was not engaged in interstate commerce, the fact that *the employer served people who were engaged in interstate commerce was enough to make those employees necessary for the production of goods for*

commerce. Certainly, if a fireman and engineer of a building, who merely furnish heat to another employer whose employees are engaged in interstate commerce, are covered by Section 7 of the Act, there is no question that cooks in logging camps, who are working directly for an employer who is engaged in the production of goods for interstate commerce, are covered by the Act.

This case completely refutes the statement made by counsel and the narrow interpretation to be put on the word "produced". The court holds definitely that it is not necessary to have physical contact with the goods in order to be engaged in producing the same. The court states (p. 571) :

"It is quite obvious that the defendant's engineer, firemen, elevator operators, watchmen, carpenters and porter were not engaged in the production of goods for commerce in the sense that they had actual physical contact with the goods produced. The word 'produced,' however, was used in no such restricted sense in the act. It is defined at some length in Section 3 (j), 29 U. S. C. A. Sec. 203 (j), with the obvious intention of giving it a broader meaning than the one which it has in ordinary usage."

The court then states, after quoting the statutory definition of "produce":

"Thus, for the purposes of the act an employee is to be deemed engaged in the production of goods for commerce not only when he has direct physical contact with the goods, but also

when he is employed in 'any process or occupation necessary to the production thereof.' "

The court then states :

"The question before us, therefore, comes down to whether the men with whom we are here concerned were engaged in an occupation necessary to the production of goods for commerce. We think they were. All the manufacturing tenants in the defendant's building need heat and light; most need elevators to carry men and material up to their respective floors in the building and to take finished product and men down;
* * *".

The court then proceeds to set out the work of the individuals involved in the case.

The court also comments on the possibility of a strike of the elevator operators, and as to the effect of that strike even on their own employer, who, himself, was not engaged in producing goods for interstate commerce, and on the tenants of the building who were so engaged. This illustration would more vividly apply in a strike or stoppage of work by cooks in the cookhouse of a logging camp where food is so essential to the carrying on of the operation.

In the case of *Fleming v. Arsenal Bldg. Corporation*, 125 Fed. (2) 278, the Circuit Court of Appeals held that similar employees, who furnished service to a building, where the tenants were engaged in the production of goods for interstate commerce, were under the Fair Labor Standards Act. The court in so

holding reversed the lower court. The court, speaking through Justice Learned Hand, very succinctly states the question (page 279):

“Whatever may be thought of the applicability of this definition down to the last clause, we are satisfied that the ‘occupation’ of these men was ‘necessary to the production’ of the clothes. If instead of leasing space in the defendant’s building, the manufacturers had each owned and occupied a whole factory of his own, this conclusion seems to us scarcely debatable.”

(In this case, the employer had his own cookhouse employees, and in the above case, Justice Hand says the fact that they would be covered by the Act is “scarcely debatable”.) The court further states:

“Cutters and stitchers cannot work in a cold or filthy building; they must have light and power to drive their machines; they cannot be required to carry goods from one story to another. Those who make and keep the factory fit for them in these ways are as ‘necessary’ to ‘production’ as they are themselves.” (Citing cases.)

The court effectively disposes of the entire argument of point 1 of appellant’s counsel; particularly the court disposes of the “parade of horrors” as set out on page 13 of the brief, wherein counsel argues that if the cookhouse employees are necessary for the production of goods for commerce, the farmer who supplied the seed for the eating material would be under the Act. Apparently counsel in the *Fleming Case* made the same type of argument, and went so far as to extend his argument to “the miller who fur-

nishes the flour to a baker who sells bread in other states" or "the cutler who sells knives to a wholesale butcher," or "the service station which repairs and fills a manufacturer's trucks," or "the chemist who supplies alcohol to a perfumer." Further *reductio ad absurdum* arguments were made. Justice Hand disposes of this type of argument (page 280) by saying:

"Since the words and the purpose of the act coalesce so far, we will not allow ourselves to be drawn into dialectical niceties which are not before us and whose answer need not compromise the step we are taking."

In the case of *Warren-Bradshaw Drilling Company v. O. V. Hall, et al*, 5 Labor Cases, Paragraph 60,821 (U. S. Circuit Court of Appeals, 5th Circuit), it was held that employees, who were engaged in operating an artery drill for drilling holes for oil which would eventually move in interstate commerce, were engaged in an "occupation necessary for the production of goods for commerce" within the Act. The defendant involved in this case was a drilling contractor, and neither the employer nor the employee actually produced any oil or had any interest in oil. However, the court held that even though the actual employer or employee were not actually engaged in the production of goods for commerce, the employee's services were necessary for the production of the oil.

In the *Kirschbaum case*, the *Arsenal case* and the *Warren-Bradshaw case*, the employer, himself, was

not engaged in the production of goods for commerce. In this case, the court does not have to go that far, because it is admitted that 70% of the goods manufactured by the employer were eventually moved in interstate commerce.

We have already seen that watchmen, janitors, firemen, engineers, etc., were all held by Circuit Courts of Appeal and state Supreme Courts to be occupations "necessary for the production of goods for commerce", even though in some of these cases the actual employer of the plaintiff was not himself engaged in interstate commerce. It follows then that an individual who is engaged in seeing that men are fed so that they may continue on the job is just as necessary as a watchman for the production of goods for interstate commerce.

In the case of *Ikola v. Snoqualmie Falls Lumber Company*, 112 Wash. 156, 121 Pac. (2d) 369, the Supreme Court had before it a case similar to the one before this court now, and reversed the case on a procedural ground. However, in the lower court, which decision is reported in 4 Labor Cases (CCH), paragraph 60,615, the lower court definitely held that *the employees of the cookhouse were engaged in an occupation necessary for the production of lumber for interstate commerce and the cookhouses were not service establishments.*

Interpretative Bulletin No. 1, which covers the points of jurisdictional coverage, states as follows:

“The second category of workers included those engaged in ‘the production of goods for (interstate) commerce’, applies, typically but not exclusively, to that large group of *employees engaged in manufacturing, processing, or distributing plants, a part of whose goods moves in commerce* out of the State in which the plant is located. *This is not limited merely to employees who are engaged in actual physical work on the product itself*, because by express definition in section 3(j) an employee is deemed to have been engaged ‘in the production of goods, if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or *in any process or occupation necessary to the production thereof, in any State.*’ Therefore the benefits of the statute are extended to such employees as maintenance workers, watchmen, clerks, stenographers, messengers, all of whom must be considered as engaged in processes or occupations ‘necessary to the production’ of goods. *Enterprises cannot operate without such employees. If they were not doing work ‘necessary to the production’ of goods they would not be on the payroll.* Significantly, it is provided in section 15(b) that ‘proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within 90 days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods’. Hence, except for the special categories of employees within the exemptions of section 13, *all the employees in a place of employment where goods shipped or sold in interstate commerce were produced, are in-*

cluded in the coverage, unless the employer maintains the burden of establishing, as to particular employees, that their functions are so definitely segregated that they do not contribute to the production of the goods for interstate commerce as these terms are broadly defined in the act." (Emphasis ours.) (2 CCH Labor Cas., ¶ 32,101.)

Other cases which have held that watchmen, maintenance men, repair men, clerical workers, telephone operators, messengers, janitors, etc., were "necessary for production of goods for commerce" are *Fleming v. Hawkeye Pearl Button Co.* (C. C. A. 8th, 1940), 113 Fed. (2d) 52; *Bowie v. Gonzalez* (C. C. A. 1st, 1941), 117 Fed. (2d) 11; *Snyder v. Cassales* (S. D. N. Y.), 5 CCH Labor Cas., Par. 60,958; *Pruitt v. Carruthers & Son* (D. Ct. Tenn.), 5 CCH Labor Cas., Par. 60,957; *McMillan v. Wilson* (Minn.), 5 CCH Labor Cas., Par. 60,954; *Robinson v. Larue* (Tenn.), 156 S. W. (2d) 433; *Reeves v. Howard Refining Co.* (N. D. Tex.), 33 F. Supp. 90; *Muldowney v. Seaberg Elevator Co.* (E. D. N. Y.), 39 F. Supp. 275; *Lefevers v. General Export Iron & Metal Co.* (S. D. Tex.), 36 F. Supp. 838; *Johnson v. Phillips Buttorf Co.* (Tenn. Chanc., decided Jan. 2, 1942), CCH, Par. 62,709.

We think that we have conclusively demonstrated that the cookhouse employees, both at Glenwood and Camp 2, were employees so integrally tied up with the business of the employer that these employees are engaged in an occupation necessary for the production of goods for interstate commerce. The court will note out of 302 employees at Glenwood, only about 18

at the most were employed in the cookhouse. There is no distinction between these employees and their necessity for the smooth flow of commerce, as there is between an individual who sharpens an axe, who files a saw, who repairs the donkey engine or the locomotive.

In other words, paraphrasing the court in the *Kirschbaum case*, supra, the services of cooks and dishwashers are necessary in that they are both “convenient and appropriate” to the maintenance of production of logs for commerce.

II

Employees in a logging camp cookhouse at Camp 2 are not exempt from the provisions of Section 7(a) of the Act, because said employees are not engaged in any retail or service establishment, the greater part of whose selling or servicing is in interstate commerce, as provided by Section 13(a)(2) of the Act.

The test as to whether an employee is under the exemption of this Act or not is not to be determined by the status of the employee, but rather by the status of the employer. This was the holding of the Circuit Court, and such a holding is well supported by authority. In other words, the sole question is whether the cookhouse is a retail or service establishment, and this must be determined on an employer basis.

In the first place, Section 23 of Interpretative

Bulletin No. 6, quoted by the appellant, utterly destroys the argument of the appellant. The last sentence of Section 23 states: “ * * * further, the service is usually rendered at a retail price.” In this case, it was actually agreed that the food was to be produced on a cost basis (Tr. 34 and 76) in an agreement between the union and the employer. This definitely shows two things: (1) that there would be no retail price and no profit made; and (2) and that the purpose of the cookhouse was merely an adjunct and a part of the logging company and not a separate establishment.

In the stipulation of facts, it was agreed (Tr. 30) “that the defendant Consolidated Timber Company is a corporation organized and existing under and by virtue of the laws of the State of Michigan and qualified to do business in the State of Oregon, and that it owns timberlands, and is engaged in the business of logging in Washington and Tillamook counties in the State of Oregon.”

In other words, it is admitted in this case that the business of the corporation is logging and not the restaurant business.

Furthermore, we note from the Oregon Lien Law, OCLA, Section 67-1301, that cookhouse employees are definitely included as a part of the logging crew for the purposes of liens. This law is as follows:

“Every person performing labor upon or who

shall assist in obtaining or securing sawlogs, spars, piles, cordwood, or other timbers, has a lien upon the same for the work or labor done upon or in obtaining or securing the same, whether such work or labor was done at the instance of the owner of the same or his agent. *The cook in a logging, or other camp, and any and all others who may assist in or about a logging, or other camp maintained for obtaining or securing sawlogs, spars, piles, cordwood, or other timber, shall be regarded as a person who assists in obtaining or securing the sawlogs, spars, piles, cordwood, or other timber herein mentioned*". (Emphasis ours.)

We think that the agreement made between the company and the union as to furnishing meals on a cost basis is of particular significance. The reason this was included in the agreement is obvious. It was recognized by the parties that the company was not engaged in the business of operating restaurants, but it was engaged in the business of logging, and there was no purpose in making a profit out of the cookhouse at the camp, but it was to be maintained merely as an integral part of the whole logging operation. As we interpret "service establishment", it would mean a business conducted for profit, such as a filling station or garage. The original purpose of the service and retail establishment exemption is set out in the legislative history of Section 13(a)(2) of the Act, as follows:

In the original bill (HR. 7200, S. 2475), introduced May 24, 1937, there was no express exemption

for retail or service establishments and there was no mention of any limitation in respect to the coverage of such establishments. However, in the first hearing on the bill Robert H. Jackson, in answer to a question about the application of the bill to retailers and the service trades, stated: "It was not intended by this bill to apply generally to retailers or to apply to the service trades, such as the filling-station attendant, and the pants presser and small business * * *." (House Hearing, page 35.)

At the House debate regarding the exemption for retail business on May 24th, 1938, the author of the amendment stated that it was intended to dispel doubt about the exemption applicable to retailing and that if accepted then "retail dry goods, retail butchering, grocers, retail clothing stores, and department stores will all be exempt." Representative Norton agreed to this amendment and it was passed by the House. After passage, Representative Johnson of Oklahoma remarked that the amendment is intended to "protect the little corner store, filling station and other retailers who purchase a substantial part of their goods across the state line" (83 Cong. Rec. 7437-7438).

In the final conference report the words "or service" and "or servicing" were included. There appears to be no record of any discussion concerning these words.

If there is any further need for argument on this,

we notice that Interpretative Bulletin No. 6, Section 40, quoted by the appellant, sets out typical examples of service establishments, such as restaurants, cafeterias, roadside diners, hotels, etc. This bulletin, set out on pages 30 and 31 of appellant's brief, among other things states:

“The cookhouses and bunkhouses are not adjuncts which are unrelated to the business of lumber or mining. They are as much a part of the principal business as the tool sheds.”

We submit, therefore, that both cookhouses at Glenwood and Camp No. 2 are not retail or service establishments.

Counsel criticizes the fact that these interpretative bulletins have been changed. Actually, as we understand the record (Tr. 36), there was no interpretative bulletin which held that logging camp cookhouses were exempt. There was merely an ex parte letter in correspondence carried on between the National Lumber Manufacturing Association and the Wage and Hour Administration of which the cross-appellant had no knowledge. Note particularly the correspondence between the representative of the employees and the Wage and Hour Administration on this subject (Tr. 37). The weight to be given interpretative bulletins (and we do not mean ex parte letters which have no effect in law of any kind) is accurately stated in *U. S. v. American Trucking Co.*, 310 U. S. 534, 549, 60 S. Ct. 1067, 1069, that such interpretations are entitled to great weight.

The appellate courts have also disposed of this question of retail and service establishments in the case of *Fleming v. Kirschbaum, supra*, (p. 572), where employees such as firemen, engineers, elevator operators, etc., for a building were held to be in an occupation necessary for the production of goods in interstate commerce. The court, in replying to the defendant's contention that these employees, working for the building, were engaged in a service establishment held:

“We agree with the district court that the defendant's business is not a ‘service establishment’. It may be conceded that the defendant's employees render service to the tenants but this service is merely incidental to the business of the defendant which is that of leasing space in its building rather than of selling service. *The rendering of some service is incidental to most businesses but they are not thereby necessarily stamped as ‘service establishments’.* That term may not be given so broad a meaning since it represents a special exception to the general coverage of the act. *Fleming v. Hawkeye Pearl Button Co.*, 8 Cir., 1940, 113 Fed. (2d) 52.” (Emphasis ours.)

The court further states that had Congress intended the term “service establishments” to include all establishments rendering incidental service, it would not have considered it necessary to make specifications in the case of carriers by air, carriers by

railway, trolley or motor bus, and telephone exchanges (Sec. 13(a)(4), (9), (11)).

The court further states:

“In reaching our conclusion we have given weight to the fact that the exemption as to service establishments was added by the conference report to the exemption as to retail establishments already contained in subparagraph (2) of Section 13(a) of the bill. From this it is fair to infer that the type of establishment meant is that which has the ordinary characteristics of a retail establishment except that it sells services instead of goods. In other words it is an establishment the principal activity of which is to furnish service to the consuming public. Typical retail establishments are grocery stores, drug stores, hardware stores and clothing shops. In *Wood v. Central Sand & Gravel Co.*, D. C. W. D. Tenn. 1940, 33 F. Supp. 40, 47, the court suggested as illustrations of what Congress meant by service establishments ‘barber shops, beauty parlors, shoeshining parlors, clothes pressing clubs, laundries, automobile repair shops.’ We think these illustrations apt.”

In the case of *Fleming v. Arsenal Bldg. Corporation*, supra, Justice Hand similarly held that elevator operators, etc., working in a building where goods were produced for interstate commerce were not exempt by Section 13(a)(2). The court, after holding that the defendant was not a service establishment, the greater part of whose service is in intrastate commerce, said:

“Possibly it is not a ‘service establishment’ at all; perhaps that phrase should be limited to

those who serve consumers directly, like tailors, or garages, or laundries; the juxtaposition of retail selling and 'servicing' does indeed suggest as much. But it is enough for our purpose that, if it is a 'service establishment,' at least its exemption must depend upon the extent to which its servicing is intrastate. * * * The 'servicing' being a part of 'production,' *the test should be what kind of production it is a part of.* * * * It cannot be that if the exemption extends beyond retail 'servicing,' it is the character of the 'servicing' itself that counts, divorced from the 'production' of which it is a part. Again, we should be met by the anomaly arising from such an interpretation—the capricious incidence of the act resulting from the accident of the industrial division of the whole process.” (Emphasis ours.)

In other words, Justice Hand has well stated *that inasmuch as the work done was actually part of production of goods for interstate commerce, there cannot be at the same time a service establishment.*

Counsel (p. 48 Appellant's Brief), after quoting part of the above language of the *Arsenal case*, states: “We take this language to mean that if the 'service' (here the serving of foods in logging camps) is part of the production of goods for commerce, then the exemption clause is not applicable. But such an interpretation, as we have pointed out before, successfully reads out of the Act entirely the exemption granted by Section 13(a)(2).”

In other words, counsel and ourselves have agreed on the meaning of the *Arsenal case*. However, the

type of exemption that Section 13(a)(2) is meant to cover is clearly stated in Sections 24 and 30 of Interpretative Bulletin No. 6. We quote Section 24 in full, which counsel for appellant has seen fit to quote only in part (2 CCH Labor Cas., ¶ 32,225) :

“Typical examples of service establishments akin to retail establishments, within the meaning of the exemption are: Restaurants; cafeterias; roadside diners; hotels; tourist houses; trailer camps; home laundries; barber shops; beauty parlors; public baths; scalp-treatment establishments; masseur establishments; funeral homes; embalming establishments; crematories; establishments engaged in cleaning, dyeing, pressing, altering, and repairing hats, clothing, and household goods for private individuals; valet shops; shoe repair shops; shoeshine parlors; dress-suit rental establishments; public garages; automobile laundries; ‘drive it yourself’ establishments; battery shops; parking lots; musical instrument repair shops; piano tuning establishments; radio repair shops; watch, clock, and jewelry repair establishments; household refrigerator service and repair shops. These establishments operate in the same manner as retail establishments and have substantially the same attributes. The principal difference is that their revenue is derived primarily from the sale of service instead of from the sale of merchandise.”

We also quote section 30, which provides :

“In a broad sense every business performs service, yet no one would seriously urge that all types of businesses were eligible for exemption under section 13(a)(2). It would be surprising indeed, if Congress had intended by the one word ‘service,’ as used in the phrase ‘retail or service

establishment,' to grant an exemption broad enough to include all of the above-mentioned classes of business, and there is nothing in the legislative history of section 13(a)(2) to support such a conclusion."

In other words, Section 24 indicates a true service establishment and Section 30 reminds us that the type of argument in which counsel has engaged would make everything a service establishment. Obviously Section 13(a)(2) would apply to a situation, such as a person engaged in a pressing shop in Portland, Oregon, who might deliver a small part of his products to Vancouver, Washington. He would be engaged in interstate commerce, but at the same time it would be a service establishment, the greater part of whose servicing is in intrastate commerce.

The case of *Stucker v. Roselle* (W. D. Ky.), 37 F. Supp. 864, is a good illustration of almost exactly the situation we have quoted above. In that case there was involved a company that cleaned and blocked hats for individuals, also by mail order within and without the state. It was held in that case that the employees were engaged in commerce under Section 7 of the Act. However, it was ruled that the employment was exempt because of the fact that this employer was conducting a "service establishment", within the meaning of Section 13(a)(2), and that the greater part of this employer's business was in intrastate commerce. This is the type of situation that Section 13(a)(2) sought to exempt.

In the *Warren-Bradshaw Drilling Company case*, supra, it was held that the oil well contractor was not a service establishment. In all the cases cited above the employer, himself, was not engaged in the production of goods for interstate commerce and the employment under consideration was the only employment engaged in by the plaintiff. In the case at bar, the answer is simpler.

Counsel (p. 24, Appellant's Brief) sets out some rather interesting cases giving the definition of "establishment". The case of *Lilley v. Eberhardt*, 37 S. W. (2d) 599, is not in point, nor is *McNabb v. Clear Springs Water Co.*, 239 Pa. 502, 87 Atl. 55.

The case of *Veazey Drug Co. v. Bruza*, 169 Okla. 418, 37 P. (2d) 294, cited by appellant, is directly opposite to the position taken by the appellant in this case. In that case the Industrial Accident Commission of the State of Oklahoma had held that retail businesses were not within the meaning of the Industrial Accident Act. In this case, the drug company had a large number of retail stores and also had a warehouse in connection with the same. It was contended by the plaintiff that the drug company was operating a "transfer and storage business." The court held that the business engaged in was a "retail drug business," and that pending the selling thereof, the company stored its merchandise in this warehouse. The court definitely held that inasmuch as the store was engaged in a retail business it could not also

be engaged in a transfer and storage business or in a wholesale mercantile establishment. It therefore held that inasmuch as the main business of an employer was a retail establishment, he could not at the same time be engaged in a wholesale establishment and declined to hold that they were separate establishments.

Similarly in this case, the appellant cannot be engaged in a retail or service establishment, when the main business of the employer is that of logging, the cookhouse being merely an incident to the main general business of the employer. It may be true that there are some large companies who are engaged in several kinds of business. (The writer recalls one at the present time prominently in the news, which has engaged in building dams, building ships, manufacturing cement, running steel mills, etc.) In such a case, it is quite true that such a corporation would be engaged in different types of business. But, in the case before us, such is not true. The cookhouse is an integral part of the logging operation and is merely an incident of the main operation, the same as a blacksmith shop, etc.

The case cited of *Rivera v. Central Aguirre Sugar Co.* (D. C., Puerto Rico, 1941), 4 CCH Labor Cases, par. 60,526, of course, is substantially different from the case at bar. In that case there was the situation of a large sugar company who maintained a hotel, a golf course and a swimming pool, contrary to the

statements of fact made by counsel (page 46 of brief). There was no evidence that any of the plaintiffs lived at the Aguirre Club, used the golf course or the swimming pool. Apparently they only worked there. There is a statement, however, that some of them did live at the hotel. In any event, this is an entirely different situation. This is a situation of a company who is engaged in different commercial enterprises, and it would be far fetched imagination to say that a golf club or swimming pool or a hotel of the kind described in this case would be necessary for the production of sugar. These were apparently separate enterprises of the company, which were used for profit and not for the purpose of producing sugar. Incidentally, this particular company also had a retail store. In this case the court seemed to be of the opinion that the warehouse was so tied up with the retail store that they were not engaged in the production of goods for commerce. In other words, this case in many respects is absolutely contrary to the proposition for which appellant cites the case. In other words, *the court found in this case that a warehouse was so tied up with the store that it was a part of the retail store*. Conversely, in the case at bar the cookhouse is so tied up with the production of goods for commerce that it would not be exempt as a service establishment.

The case of *Labates v. Interstate Co.*, 4 Wage and Hour Reporter 91, 3 CCH Labor Cases, par. 6,031, has an entirely different set of facts. The facts in that

action show that there was a large corporation with a greater number of individual or privately owned restaurants located all over the country in railroad stations and also in department stores in metropolitan areas. These restaurants were independently owned and were concessions with admittedly no vestige of integral or functional relation to the operation of the railroad or the department store. These restaurants admittedly were used only for the convenience of the general public who might happen to use them and not in any way to minister to the wants of either department store employees or train crews. These restaurants were operated as substantive enterprises for profit for a clientele as available to it in other sources of similar services, which comprised casual rather than systematic users of its facilities.

As we have previously quoted, the case of *Ikola v. Snoqualmie Falls Lumber Company*, supra, held that cookhouse employees were not engaged in a service establishment. Other cases holding that watchmen, elevator operators, janitors, telephone operators, firemen and engineers were not engaged in working in a retail or service establishment are cited previously under part I of this brief, page These previously cited decisions, which held that the above category of employees were engaged in an occupation "necessary for the production of goods for commerce", also held that these employees were *not* engaged in a retail or service establishment.

In the case of *Wood v. Central Sand & Gravel Co.*, 33 F. Supp. 40, 46, the court considered Section 13(a)(2) at length in regard to the situation of a night watchman, and concluded as follows:

“It, therefore, follows that the defense based upon the exemption provided in section 13(a)(2) is sound *only if it appears that the real defendant is a ‘retail or service establishment the greater part of whose selling or servicing is in intrastate commerce.’ By no stretch of the imagination could either the Fischer Lime & Gravel Company or its trade-name branch, Central Sand & Gravel Company, be called properly a ‘service establishment’.* The defendants do not operate barber shops, beauty parlors, shoe shining parlors, clothes pressing clubs, laundries, automobile repair shops, or the like. In its interpretative bulletin No. 6, issued December 7, 1938, the Wage and Hour Division of the Department of Labor has defined a ‘retail establishment’ as one which ‘sells merchandise to the ultimate consumer for direct consumption, and not for purposes of re-sale in any form’.

“*This definition does not appear to be sufficiently comprehensive.* Indeed, the Department of Labor itself seems to recognize that it is not; for in its Release No. R-116, December 7, 1938, this statement appears: ‘A retail establishment generally sells its merchandise in small quantities and at prices higher than the price involved in sales to wholesalers or jobbers. Thus, for example, it would seem that a coal company engaged in selling large orders of coal at a discount from the regular retail price would not be a retail establishment under Section 13(a)(2), notwithstanding the fact that the coal is purchased for direct consumption and not for purposes of resale in any form.’

“It is hard to conceive that the defendant in the instant case can be regarded as a ‘retail establishment.’ ” (Emphasis ours.)

In this last example of a coal company selling large orders at wholesale prices for ultimate direct consumption not being a retail establishment, cross-appellant submits that the court has stated a compelling analogy to our case. The cookhouse is of course a restaurant in the elementary sense, in that it is a place where food was sold to the consumer. But in analogy to the coal company selling to consumers at *wholesale* prices in *industrial* quantities, the particular cookhouses here involved sell at *wholesale* prices, to a *fixed clientele* which has *no alternative market* with which the cookhouse is in competition, and which makes this quantity price to the special class of consumers *without profit to itself*, as a necessary adjunct to the major activity of its owners, for the special purpose of maintaining intact the labor supply of the company—*and only secondarily of delivering service for its own sake.*

The case also emphasizes the important factor that the institution dispensing the service must be an “establishment”, and that for all practical purposes and in most instances the appellant will be the party who must be examined as to whether he or it is an establishment dispensing service. Now, of course, the Consolidated Timber Company in its capacity as a producer of logs is not a service establishment. To

accord with the contentions of the appellant, the court would have to find that the appellant company exists in two capacities, each being separate and distinct from the other in organization, physical location, function, and *ultimate purpose*, and that one of these capacities, the one in which cross-appellant is employed, is that of a service establishment. To cross-appellant, any contention that the cookhouse function of the Consolidated Timber Company complies with such requirements is absurd. In a most literal sense, the *service* of supplying food for the men is as much an operation in the *production* line as is that of supplying fuel for the donkey, or as is that of payroll clerk, timekeeper, toolhouse clerk, or any of the score of other positions of supply, maintenance, and of a custodial nature which are indispensable to production of logs for interstate shipment. In an equally literal sense, and not at all by way of metaphor, the job of stoking the men satisfactorily for the next day's work is as closely related to smooth and amicable employment relations and steady production of such goods as is that of stoking the furnaces and watering the boilers by the night watchman in the cases cited, who have been uniformly held to be covered by the Act. And this is so, it should be kept in mind, precisely because the operation is *not* analogous to that of a union depot cafeteria, or a lunch room in a city factory, or even a cookhouse adjacent to a lumber mill in an urban district.

One or two examples will clarify further the contentions of the cross-appellant: If this Act were one applying to seamen, which it is not for the reason that other federal legislation covers them, could it be argued with any plausibility that the *ship's cook* operated a service establishment? On an *Antarctic expedition*, the cooking facilities and activities are an integral part of the principal establishment. The mess department of *every army* unit is similarly vital, and it may justly be said that a logging operation works, just as surely as an army travels, on its stomach. Would a *dining car* on a transcontinental train be a "service establishment", or would a *cook and bunkhouse on a ranch* be refused coverage if the Act purported to apply to it? A logging operation miles from the nearest hamlet (Camp 2 was 17 miles from Glenwood, which has a postoffice and store, and 6 miles from the village of Timber) is more closely akin to the above illustrations than it is to a city depot cafeteria or a hotel barber shop or laundry.

The very fact that the test of intrastate business is the proportion of *sales* or items of service indicates that Congress contemplated a variety and spread of business, and was thinking of concerns or establishments with customers or clients from more than a single plant, operation or factory, and especially of situations in which no alternative to patronizing such establishment presents itself. We consider that the distinction was intended to be established between

service *establishments*, in the sense of independent and separate industries, and those activities which are vital adjuncts of a single factory or operation. These latter are service *activities* because they *serve* the primary operation, but cannot properly be called service establishments within the meaning of the Act because they do not respond to the distinction between *production industries* and *service industries*. In short, the proper line of differentiation is that of the economists—the contrast of those distinct enterprises which *produce goods*, whether capital or consumers', and those equally separate and distinct enterprises which *deliver services*. A production establishment may and in most instances does include phases which, considered separately and unrealistically, constitute service activities. But, as a going concern, in the sense in which the protection of interstate commerce is relevant, such incidental service activities within or integrally related to a production establishment are *parts of it* for all the purposes of the Act with no independent or substantive existence in their own right. And with respect to this case, we think that there is little question that there is no *substantive* service character in logging camp cookhouses.

In sum, we contend that by the very fact that the cookhouse is an indispensable part of the logging operation, its employees are engaged in an activity, process or occupation, necessary to the production of goods for commerce, and it cannot be considered

a service establishment. In the various bulletins and rulings, the commentators list, as illustrations of the establishments which are certainly of a service character, the following: Hotels, restaurants, laundries, garages, barber and beauty shops, funeral homes, supply stores, drug stores, groceries. None of these presents a compelling analogy to the situation of a logging camp cookhouse, located many miles from settled districts, and furnishing the only source of meals for the employees of defendant, and by and large for them only. Bulletin No. 1 lists stenographers, messengers, watchmen, clerks and maintenance workers as employees engaged in producing goods for commerce for the reason that "enterprises cannot operate without such employees." This is at least equally true of cross-appellant and his assignors in the present case. And the evidence further shows that from the standpoint of the purposes of the Act and of the interests of the appellant, the service rendered and the goods sold are clearly "for industrial or business purposes", under the requirement of Bulletin No. 6, Sub. 8 and 11, quite as literally as is the coal sold to a factory by a fuel supply company, and without the added factor of separate management, control and profit-taking. Regarding this test of "industrial or business" purpose, the following is significant:

"The term 'retail sales' means 'sales to *individual consumers*', the inspectors have been instructed. 'A sale for industrial or business purposes as distinguished from private consumption,

is not a retail sale', the inspectors have been advised." (CCH Service, FLSA, 33-273.)

"You also suggest that laundries should be considered 'service establishments' within the meaning of Section 13 (a) (2) of the Act, which exempts any employees engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce. We are enclosing Interpretative Bulletin No. 6 which discusses the exemption, and your attention is particularly directed to paragraphs 10 through 15 of this bulletin. You will note that laundries which perform laundry work for private individuals are ordinarily considered to be 'service establishments' within the meaning of the exemption. *However, as suggested in paragraphs 7, 8 and 11 of that bulletin, laundries performing work for industrial establishments would not be considered service establishments * * *.*" (Emphasis ours.)

Paragraph 22 of Bulletin No. 6, in speaking of retail establishments, announces that the Administrator will include them in the classification of a dominant wholesale concern "*if the entire enterprise is consolidated and operated as a distinct or integrated business unit.*" Such is the present case.

Further, even the dictionary meaning corresponds to our contentions. One of the definitions for the word "service"—the only one which is at all related—reads:

"Service: Any result of useful labor which does not produce a tangible commodity. In economics, such *business concerns* as railroads, telephone companies, or laundries, and such persons as physicians, are regarded as performing serv-

ices.'—Webster's New International Dictionary. (Emphasis ours.)

Our cooking activity is certainly not a *concern*, or an *enterprise*, because it is not independently owned, it is operated at cost, and it is intended to serve the major objects of the logging operations.

It is of no argument here to state that the cookhouses were entirely separate buildings. The logging companies do not operate as factories, which have all operations under one roof. Logging operations are scattered over miles of territory. Under the interpretation asked for by the appellant, because the cookhouse was in a separate building, the blacksmith shops and the repair shops similarly would not be under the Act. We do not believe that even the appellant would contend this.

Again, we call to the court's attention the collective bargaining agreement which provided for a cost basis. We can be certain that if this was a separate service establishment, the company would not be operating a cookhouse for the amusement it received from such an enterprise. *Actually, the cookhouse was operated because it was an integral part of the logging operation and it was not a service establishment of any kind.*

The law is clear that the exemptions must be strictly construed and the burden of proof is upon the employer to remove itself from such exemption. There

is no evidence in this case that the cookhouse at Glenwood or at Camp 2 advertised to the general public for customers. In fact, the record shows that the few strangers who did eat at Glenwood were charged extra for their meals. It could well be argued that this was not a retail or service establishment because the food was carried at a cost basis, and courts have held and interpretative bulletins have stated that where production is on a wholesale basis, it is not a retail establishment at all (see particularly *Pruitt v. Caruthers & Son, supra*, wherein a retail establishment which sold part of its goods retail and part wholesale and most of them in intrastate commerce was held not a retail or service establishment because part of the goods were sold at wholesale rates. See also *Wood v. Central Sand & Gravel Co., supra*.)

III

Employees of the cookhouse at Glenwood were not exempt under the provisions of Section 13(a) (2) of the Fair Labor Standards Act.

As we have previously indicated, this is the opening argument of the cross-appellant. Most of the arguments that would be advanced under this heading have already been covered in point I, and particularly point II, of our brief. We, therefore, are not going to belabor the court with repetitious arguments, but merely refer the court back to the previous parts of our brief.

We believe that the court below was definitely in error when it excluded the Glenwood camp on the ground that it was a service establishment. As we have pointed out, there were but few of the general public that ever stopped at the place, and we can assume that many of those were people who went to the company on business. It is also to be noted that a higher rate was charged any stranger that might happen to eat there. Particularly, the court below was in error in citing as one of its reasons for its decision that the Glenwood camp is a service establishment. The court states: "The employees in the woods and union stipulated it should be operated at cost and should be self-sustaining" (Tr. 65). This clause in the collective bargaining agreement clearly pointed out that this was *not* a retail or service establishment, to be operated at profit, but was a necessity, otherwise the employer would never have agreed to operate these cookhouses at cost.

There would have been just as much effect on interstate commerce if the cookhouse at Glenwood had to shut down; also it was just as much an adjunct of the logging business of the company as was the camp at Camp 2.

The court below was particularly in error in its statements in its criticism of paragraph 40. The court overlooks realities. There is a wide difference between a cookhouse in a logging company, which is a necessary part of the conduct of the main enterprise of the

company, logging, and the Circuit Court's general view that the company should be encouraged to operate "service establishments such as gasoline filling stations, swimming pools and beauty parlors" (Tr. 69). Such enterprises as these, although they may be admirable, have nothing to do with the getting out of logs.

On the other hand, food is an absolute essential, without which men cannot work. We believe loggers can struggle along somehow without the benefit of filling stations, swimming pools or beauty parlors. However, a logger would have a very difficult time working without food. We believe the type of statement made by the lower court is merely engaging in dialectics, such as suggested by Mr. Justice Learned Hand in *Fleming v. Arsenal Bldg. Corp.*, supra. It is true that a timber worker is a member of the general public, but at the same time he is an employee of the appellant, and it is necessary for him to eat at either the Glenwood Camp or, as the logging was moved back farther, at Camp 2, in order for the company to successfully operate.

Counsel on page 49 of his brief has seen fit to argue completely off the record and to make the statement, "and in the collective bargaining agreement made between the employers and the unions which represent them, cookhouse employees were excluded from the limitations of hours worked. Both the employers and unions have therefore explicitly recognized, first,

that the cookhouse operation is essentially a service operation and, second, that cookhouse employees are in a class apart from others employees." So that the record may be straight on this subject, appellant made such a contention that there was an agreement between the employers and the union that these men were to be worked as many hours a month as was necessary without overtime pay (see Tr. 49). However, the lower court stated in its opinion (Tr. 71) :

"The primary plan (this was the plan offered on the basis that there was no limitation of hours) offered by the defendant cannot be accepted because the court cannot find from the evidence that the contract between the defendant and those employees contains the terms which are inherent in the basis for this plan."

The collective bargaining agreement covered the cookhouse employees in all the essentials of a collective bargaining agreement, the same as it did the cutting crew, rigging crew, shop crew, track crew, etc. We cannot see, therefore, that it follows that "Both the employers and unions have therefore explicitly recognized, first, that the cookhouse operation is essentially a service operation, and, second, that cookhouse employees are apart from other employees." There is nothing in the record, either in the lower court or in this court, to justify such conclusion.

CONCLUSION

We believe that we have effectively demonstrated that employees working at the cookhouses at Camp 2

and Glenwood were employees whose occupation was necessary to the production of goods for commerce. Certainly their occupation was "convenient and appropriate" to the production of goods for commerce.

We also believe that we have demonstrated that the cookhouses at Camp 2 and at Glenwood were not service establishments, because as pointed out in *Fleming v. Arsenal Bldg. Corporation*, supra, inasmuch as servicing is a part of the production, there can be no service establishment.

We respectfully, therefore, ask the court to rule:

(1) That the cookhouse employees working at Camp 2 and at Glenwood were engaged in the "production of goods for commerce" within the meaning of the Fair Labor Standards Act of 1938; and,

(2) That the cookhouses at Camp 2 and Glenwood are not exempt under Section 13(a)(2) of the Act, and that the said employees were not engaged "in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce."

Respectfully submitted,

GREEN & LANDYE,
Attorneys for Cross-Appellant,
Ivan Womack.

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant.

vs.

BERLIN AND RUSSELL AIRCRAFT MA-
CHINE AND MANUFACTURING COM-
PANY, a co-partnership, CHARLES T. RUS-
SELL and INTERCONTINENT AIRCRAFT
CORPORATION

Appellees.

Transcript of Record

Upon Appeal from the District Court of the
United States for the Southern District
of California, Central Division.

APR - 2 1942

PAUL P. O'BRIEN,

CLERK

No. 10049

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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*Page numbering appearing at foot of page of original certified Transcript of Record.

District Court of the United States for the Southern
District of California, Central Division

No. 38270-H

In the Matter of BERLIN AND RUSSELL AIR-
CRAFT MACHINE AND MANUFACTUR-
ING COMPANY, a co-partnership,
Debtor.

PARTNERSHIP PETITION FOR AN AR-
RANGEMENT (CHAPTER XI, SECTION
323), FOR DEBTOR IN POSSESSION, AND
FOR RESTRAINING ORDER.

To the Honorable Judges of the District Court of
the United States for the Southern District of
California, Central Division:

The petition of Hubert M. Berlin and Charles T.
Russell of Los Angeles, California, respectfully
represents:

1. Your petitioners — hereinafter referred to
herein as “The Debtor”—are copartners, engaged
in the business of manufacturing airplane parts
(under the NATIONAL DEFENSE PROGRAM) and file this
petition jointly in behalf of said partnership only
and not in behalf of themselves individually.

2. The debtor has its principal place of business
at 705 Subway Terminal Building, Los Angeles,
California, and its manufacturing plant at 2348 East
38th Street, Vernon, California.

3. The debtor is not a municipal, railroad, in-
surance or banking corporation or a building and
loan corporation.

4. No bankruptcy proceeding, initiated by petition or otherwise by or against the debtor or your petitioners or either [2] of them, is now pending and that the debtor is unable without further extension of time to file its schedules of assets and liabilities.

5. The debtor is solvent but is, at this time, unable to pay its debts as they mature and proposes an arrangement with (a) its unsecured creditors and (b) its secured creditors as to such amounts, only, as are now due, and which will become due under certain installment contracts during the limited period necessary to complete this arrangement.

6. The debtor's said business is, at present, a profitable one and is now making more than enough profit to (a) pay all labor charges in full as they accrue (Note: This business is now employing more than seventy-five persons and anticipates the employment of more than two hundred persons by the end of July, 1941.), (b) to hereafter pay for all materials as they are needed and (c) to repay all loans, including the proposed new loan, within a period of not more than one year. That said business will thereafter not only be a profitable one to your petitioners but will also be extremely valuable to the National Defense Program. That the outstanding unsecured obligations of the debtor aggregate the approximate sum of Thirty-six Thousand Dollars (\$36,000.00). (Note: This sum excludes the unsecured obligation of Charles T. Russell, one of

your petitioners herein, in the amount of Forty-three Thousand Dollars (\$43,000.00), of which more later.) Of this said sum, approximately Twenty-three Thousand Dollars (\$23,000.00) is now past due and approximately Thirteen Thousand Dollars (\$13,000.00) is now on current account.

That the outstanding secured obligations against the debtor aggregate the approximate sum of Thirty-five Thousand Dollars (\$35,000.00). These obligations are as follows, to wit: [3]

- (a) A chattel mortgage on certain equipment to the Bank of America\$24,500.00

This is payable in monthly installments of \$1000.00 due on the 6th of each and every month; there is now a \$1000.00 payment past due as of March 6, 1941.

- (b) Conditional sales contracts on machinery\$11,150.00

These contracts are with Smith-Booth-Usher, Eccles & Davies, Shaw-Palmer-Bakewell & Co., and Machinery Sales; there is now approximately \$1400.00 due on these contracts and the payments are approximately \$900.00 per month hereafter.

The debtor's employees are paid in full to date and will continue to be paid in full, as their wages

accrue, from the profits of the operation of this business.

The assets of the debtor are in the approximate amount of One Hundred Seventeen Thousand Five Hundred Dollars (\$117,500.) in addition to which the debtor has a backlog of definitely committed defense orders, not all yet in the process of manufacture, in the approximate amount of Forty-seven Thousand Dollars (\$47,000) (Note: Your petitioners have every reason to believe that by the end of April, 1941, the debtor will have a backlog of orders in excess of One Hundred Fifty Thousand Dollars (\$150,000.)—this estimate is particularly based on connections with officials of Northrop Aircraft, Ryan Aeronautical Co., and Harlow Aircraft Co.)

Your petitioners are convinced that the debtor will be making a net profit of between Four Thousand Dollars (\$4000.00) and Five Thousand Dollars (\$5000.00), PER MONTH, beginning with the middle of July, 1941. [4]

7. The present financial difficulties of the debtor are the result of management troubles and inefficiency (a) in the purchase of unnecessarily large quantities of machinery and tools, (Note: Said machinery and tools will, under pending orders, now become of value.) and (b) in the acceptance of unprofitable defense program contracts which have now been fulfilled, although at a substantial loss. These management troubles have now been rectified by the discharge of the parties who were re-

sponsible, therefor no unprofitable contracts are now being accepted.

8. Your petitioner, Charles T. Russell, is informed and believes and therefore represents that he will be able to borrow enough money to make the hereinafter proposed arrangement equitable, feasible and possible; however, a reasonable length of time is necessary to enable this petitioner (Charles T. Russell) to complete negotiations and obtain said loan.

Said petitioner, Charles T. Russell, also represents that he is the debtor's largest unsecured creditor, the debtor being indebted to him in the sum of approximately Forty-three Thousand Dollars (\$43,000.00.)

Said petitioner, Charles T. Russell, offers to and will waive any and all payments of principal and interest on said sum of Forty-three Thousand Dollars (\$43,000.00), PROVIDED SAID ARRANGEMENT IS ACCEPTED AND CONFIRMED, until all other creditors are paid in full.

The affidavit of Charles T. Russell, setting forth these facts in detail, is attached hereto marked "Exhibit A" and by this reference made a part hereof as fully as though set forth at length herein. [5]

9. The debtor should be allowed to remain in possession of said business and continue to operate the same because the debtor has now eliminated wasteful methods, unprofitable contracts and inefficient management; that Charles T. Russell is the founder of the business and the largest creditor, and

is more familiar with the operation of this business than anyone else would be; in fact the continued success of this business depends directly on him. The debtor has also contracts with the various aircraft manufacturing plants such as Ryan, Lockheed, Douglas, Vultee, Vega and Northrup, and is now regularly in receipt of continuing profitable contracts from said firms and others and this is directly due to the fact that said aircraft manufacturing plants now have explicit confidence in the ability of the debtor's plant to produce the parts, dies, etc., and to do the machine work that is required by said aircraft manufacturing plants. Many of these contracts would be irrevocably lost if any change in the present executive management were to be made herein.

10. Your petitioners are informed and believe and therefore represent that a number of the creditors of the debtor have threatened to attach the property and assets of said debtor or to otherwise proceed against the debtor's said property and assets, and that if they and each of them are not enjoined and restrained by the Honorable Court that said creditors will so harass, hinder and delay the debtor in the manufacture of articles for the National Defense that the said debtor will be unable to continue in business and also unable to successfully complete this arrangement. [6]

Second: All unsecured debts affected by this arrangement shall be treated on a parity, except that of Charles T. Russell.

Third: The debtor proposes:

(a) To pay all wages, administration expenses and for all materials as these charges accrue, from the profits of the business.

(b) To pay unsecured creditors not less than sixty per cent (60%) in cash on or before June 1, 1941, and to pay the remainder within one hundred fifty (150) days thereafter.

(c) To pay the unpaid balances due to the secured creditors as they mature AFTER the 1st of June, 1941, under existing conditional sales contracts and chattel mortgages. Re installments past due as of June 1, 1941, the debtor proposes to pay on or before said June 1, 1941, not less than sixty per cent (60%) in cash on said unpaid installments, and to pay the remainder thereof within one hundred fifty (150) days thereafter.

Fourth: The debtor further proposes that your petitioners, and particularly Charles T. Russell, should, and must, if the proposed arrangement be carried out, remain in possession of the debtor's assets and all of them and should continue the maintenance and operation of the business with all of the title and exercising all of the rights and powers of a trustee appointed under the Bankruptcy Act, subject, however, at all times to the control of the court and to such recommendations, restrictions, terms and conditions as the court may from time to time prescribe. That all executory contracts that it may be advantageous to cancel, be cancelled, and

that all unprofitable operations, if any, of the debtor be suspended and set aside at the option of the debtor, with the approval of the court. [11]

Fifth: The court shall retain jurisdiction until all the provisions of this arrangement, after its confirmation, have been performed.

Wherefore, your petitioners pray that proceedings may be had upon this petition in accordance with the provisions of Chapter XI of the Act of Congress relating to Bankruptcy (1) approving the debtor's petition as having been properly filed in good faith; (2) that an order be made and entered continuing your petitioners in possession and giving directions for the conduct of the debtor's business during the pendency of these proceedings; and (3) for such other and further relief as may be deemed meet and proper.

BERLIN AND RUSSELL
MACHINE AND MANUFACTURING COMPANY, a co-partnership,

By: HUBERT M. BERLIN
Petitioner, Hubert M. Berlin
CHARLES T. RUSSELL
Petitioner, Charles T. Russell
CHARLES PECKHAM
Attorney for Petitioners

United States of America
Southern District of California
Central Division—ss.

Hubert M. Berlin and Charles T. Russell, the petitioners named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true to the best of their knowledge, information and belief.

HUBERT M. BERLIN

Petitioner

CHARLES T. RUSSELL

Petitioner

Subscribed and sworn to before me this 3rd day of April, 1941.

[Seal]

JUNE EDDY

Notary Public in and for the County of Los Angeles, State of California.

My commission expires March 1, 1945. [12]

EXHIBIT A

[Title of District Court and Cause.]

AFFIDAVIT OF CHARLES T. RUSSELL

United States of America
Southern District of California
Central Division—ss.

Charles T. Russell, with offices at Suite 701-707
Subway Terminal Building, in the City of Los An-

geles, County of Los Angeles, State of California, being first duly sworn according to law, deposes and says:

1. That he was the founder and is now the chief creditor (in the amount of \$42,885.00) of the business known as and carried on under the fictitious trade name of Berlin and Russell Aircraft Machine and Manufacturing Company, a copartnership, the members of which are Hubert M. Berlin and Himself;

2. That he is informed and believes that he can borrow sufficient money to make the Arrangement, for which a Petition is being filed by himself and the said Hubert M. Berlin trading as Berlin and Russell Aircraft Machine and Manufacturing Company, equitable, feasible, and possible, and for that purpose and in that connection he requests a reasonable amount of time to complete pending negotiations and actually obtain a loan sufficient to pay all creditors of the said copartnership, except himself, which negotiations are now actively under way with several different groups of persons; [13]

3. That the plant of the said copartnership is well-equipped to perform important and necessary functions in connection with the national defense program, and that all of its present orders are from aircraft and other companies engaged in national defense work;

4. That, provided an Arrangement is accepted and confirmed, and pending the acceptance and confirmation of such Arrangement, he offers to and

will waive any and all payments of principal and interest on said debt of the said copartnership to him in the amount of \$42,885.00, until all other creditors of said copartnership have been paid in full;

5. That with Hubert M. Berlin he originated and was instrumental in building up the business of the said copartnership and believes that the said business will not be as profitable without his management, as it will be if he is permitted to continue such management.

CHARLES T. RUSSELL

Affiant

Subscribed and sworn to before me this 3rd day of April, 1941.

[Seal]

JUNE EDDY

Notary Public in and for the County of Los Angeles, State of California.

My commission expires March 1, 1945.

[Endorsed]: Partnership Petition for an Arrangement. Filed Apr. 3, 1941, 2 p. m. R. S. Zimmerman, Clerk, By F. Betz, Deputy Clerk. [14]

[Title of District Court and Cause.]

ORDER APPROVING PARTNERSHIP PETITION FOR AN ARRANGEMENT (CHAPTER XI SECTION 323), FOR DEBTOR IN POSSESSION, DEFERRING REFERENCE HEREIN AND FOR COURT APPEARANCE ON MONDAY, APRIL 21, 1941, AT 2:00 O'CLOCK P. M. ALSO RESTRAINING ORDER.

Upon reading and filing the verified petition of Hubert M. Berlin and Charles T. Russell, doing business as Berlin and Russell Aircraft Machine and Manufacturing Company, a copartnership—hereinafter referred to as “The Debtor”—and it appearing that the debtor has filed a voluntary partnership petition for an arrangement under Chapter XI, Section 323, of the Act of Congress relating to Bankruptcy, and the same having been presented to and considered by this court and it appearing that the petitioners are proper persons and parties to file said petition, and it further appearing that said debtor is solvent but is unable to pay its obligations as they mature and that said debtor desires an arrangement (extension of time in which to pay its debts) and it appearing that the debtor, and particularly Charles T. Russell, the petitioner herein, is engaged in negotiations whereby it seems reasonable to presume that sufficient money will be borrowed by the debtor so that all of the creditors may be paid in full within a reasonable period of

time, and the court being satisfied that said petition has been filed in good faith and being advised in the premises, and no adverse interests appearing,

Now, Therefore, on the motion of Charles Peckham, Esq., attorney for the debtor, [17]

It Is Ordered:

1. That all further proceedings herein, particularly including the order of reference, are hereby continued until Monday, the 21st day of April, at 2:00 o'clock P. M., at which time a hearing will be had in the above entitled court for the purpose of considering the making of an order of reference herein.

2. That said debtor's petition be, and it is hereby, approved as having been filed in good faith and in accordance with the provisions of Chapter XI of the Act of Congress relating to Bankruptcy.

3. That the above-named petitioners (the debtor herein) are to remain in possession and control of the properties, assets and business of the debtor, as is more fully described in the debtor's petition, and shall operate the said business subject to the control of this court, until the further order of a judge of this court, it being particularly ordered that the said debtor is enjoined and restrained from disposing of any or all of the properties, assets and business of the debtor except in the regular course of business.

4. That all other persons, firms and creditors, including all the creditors listed in the debtor's petition, their representatives, attorneys and servants,

and all sheriffs, marshals and other officers and their deputies, representatives and servants, and all other persons whomsoever, be and they hereby are, jointly and severally, enjoined and restrained, until this order is modified, limited, changed or vacated by an order of a judge of this court, from instituting or attempting to institute, or proceeding or attempting to proceed with any suit or action or proceeding of any character whatsoever, involving or affecting the assets, business and property in possession of or owned by the above-named debtor or in which the said debtor has any in- [18] terest; and the aforesaid parties are, and each of them is, further restrained and enjoined from proceeding with any action which may now be pending, or procuring or attempting to procure the appointment of any receiver, or from taking or attempting to take into their joint or several possession or control any of said debtor's assets or properties, or from interfering with or attempting to interfere with, in any way whatsoever, the debtor's ownership or possession of said property, assets or business, or from interfering with or attempting to interfere with, in any way whatsoever, with the debtor's operation of its said business.

5. That a copy of this order is to be mailed to all the creditors of the debtor, on or before 5:00 P. M. on Monday, the 7th day of April, 1941.

Dated: April 4, 1941.

H. A. HOLLZER

Judge of U. S. District Court

[Endorsed]: Filed Apr. 4, 1941. 9:35 A. M. [19]

[Title of District Court and Cause.]

CLAIM OF UNITED STATES FOR TAXES

State of California

County of Los Angeles—ss.

Nat Rogan, Collector of Internal Revenue for the Sixth Collection District of California, a duly authorized agent for the United States in this behalf, being duly sworn, deposes and says: (1) That the above-named, is justly and truly indebted to the United States in the sum of \$3257.15, WITH INTEREST AND/OR PENALTIES thereon as hereinafter stated; and (2) That the nature of the said debt is internal revenue taxes due pursuant to law as follows:

Nature of Tax	Period	Tax	Penalty	Interest	
				Assessed	Accrued
Federal Insurance Contributions	4¼ 1940	54.08	As provided by law*		
“ “ “	1¼ 1941	848.78	“	“	“
“ “ “	1¼ 1941	400.00	“	“	“
Federal Unemployment	1940	81.12	“	“	“
“ “	1941	1873.17	“	“	“
		3257.15			

*The Collector of Internal Revenue should be notified before payment of this claim is made in order that advice may be given as to the correct amount of statutory interest due.

Dated this 9th day of June 1941

NAT ROGAN

Collector of Internal Revenue
for the Sixth District of California.

Subscribed and sworn to before me this 9th day of June 1941.

[Seal]

T. G. ALBRIGHT

Notary Public

My commission expires Oct. 18, 1944. [21]

[Endorsed]: Filed Jun. 9, 1941 at 45 min. past 2 o'clock P. M. Hubert F. Laugharn, Referee. M. E. Marsh, Clerk M. S.

[Endorsed]: Filed Jun. 10, 1941, 10:36 A. M. R. S. Zimmerman, Clerk. By M. M. Karcher, Deputy Clerk [22]

[Title of District Court and Cause.]

AMENDED CLAIM OF UNITED STATES FOR
TAXES

State of California

County of Los Angeles—ss.

Nat Rogan, Collector of Internal Revenue for the Sixth Collection District of California, a duly authorized agent for the United States in this behalf, being duly sworn, deposes and says: (1) That the above-named, is justly and truly indebted to the United States in the sum of \$3,366.32, **WITH INTEREST AND/OR PENALTIES** thereon as hereinafter stated; and (2) That the nature of the said debt is internal revenue taxes due pursuant to law as follows:

Nature of Tax			Period	Tax	Penalty	Interest	
						Assessed	Accrued
Federal Insurance Contributions			4th 1/4 '40	54.08	As provided by law*		
"	"	"	1st 1/4 '41	848.78	"	"	"
"	"	"	2nd 1/4 '41	476.58	"	"	"
Federal Unemployment			1941	1,986.88	"	"	"
				<hr/> 3,366.32			

*The Collector of Internal Revenue should be notified before payment of this claim is made in order that advice may be given as to the correct amount of statutory interest due.

(I. T. 1746)

Dated this 19th day of August 1941

NAT ROGAN

Collector of Internal Revenue
for the Sixth District of California

Subscribed and sworn to before me this 19th day
of August 1941

[Seal]

T. G. ALBRIGHT

Notary Public

My commission expires Oct. 18, 1944 [23]

[Endorsed]: Filed Aug. 21, 1941 12:28 P.M. R. S.
Zimmerman, Clerk. By M. M. Karcher, Deputy
Clerk. [24]

[Title of District Court and Cause.]

ORDER FOR HEARING AT 9:30 A. M., AUGUST 2, 1941, ON QUESTION WHETHER DEBTOR IS LIABLE TO FEDERAL UNEMPLOYMENT TAX.

The above entitled matter having come on further to be heard before this Court at 10 o'clock a. m., on July 28th, 1941, pursuant to prior Order of the Court, and the claim of the United States, through the Collector of Internal Revenue at Los Angeles, California, for Federal Unemployment Tax, under Section 1600 of the Internal Revenue Code, as amended, having been called to the Court's attention, which tax the Debtor claims it does not owe, and the Court having suggested that the said question be submitted to it upon an agreed statement or stipulation of facts:

It Is Hereby Ordered that a hearing be had on the said claim for Federal Unemployment Taxes in this Court at 9:30 a. m., Saturday, August 2, 1941.

It Is Further Hereby Ordered that the Collector of Internal Revenue at Los Angeles, California, be notified of such hearing by service being made upon him on or before 5 o'clock p. m., July 30, 1941, which service will be sufficient.

Dated this 30 day of July, 1941.

H. A. HOLLZER,

Judge, United States District Court.

Approved as to Form:

CHARLES PECKHAM,

Attorney for Debtor.

ARTHUR H. DEIBERT,

Attorney for Charles T.

Russell, individually.

July 30, 1941 Receipt Acknowledged.

COLLECTOR OF INTERNAL
REVENUE,

By EUGENE HARPOLE,

By PATRICIA PECK. [25]

[Endorsed]: Filed Jul. 30, 1941.

[Title of District Court and Cause.]

STIPULATION OF FACTS ON QUESTION
WHETHER DEBTOR IS LIABLE TO FED-
ERAL UNEMPLOYMENT TAX.

It is hereby stipulated and agreed by and between counsel for the Collector of Internal Revenue at Los Angeles, California, for the Debtor, and for Charles T. Russell individually, that the following facts are true and correct but that any of the parties hereto may submit further evidence, not inconsistent herewith, at the hearing of this matter before this Court.

1. The Debtor Copartnership of Berlin and Russell Aircraft Machine and Manufacturing Company was formed on November 7, 1940.

2. The payroll of the Debtor from November 7, to December 31, 1940, was \$2,220.66, and if any

Unemployment Tax to the United States and to the State of California jointly was incurred by the Debtor during the said period, said tax was in the amount of \$66.62.

3. That for the first quarter of the calendar year 1941, said quarter ending March 31, 1941, the payroll of the Debtor was \$42,400.17, and if any Unemployment Tax to the United States and to the State of California jointly was incurred by the Debtor during the said period, said tax was in the amount of \$1,272.01.

4. That for the period April 1, 1941, to May 16, 1941, inclusive, (the latter date being the date on which the sale of certain of the assets of the Debtor to Intercontinent Aircraft Corporation became effective by order of this Court, since which time the Debtor has not had any employees) the payroll was \$23,828.88, and if any Unemployment Tax to the United States and to the State of California jointly [27] was incurred by the Debtor during the said period, said tax was in the amount of \$714.87.

5. The Debtor did not file any returns under the Federal Unemployment Tax Act or under the California Unemployment Insurance Act for the reason that it believed it was not liable for the said tax under either of said Acts.

6. From January 1, 1941, to May 16, 1941, inclusive, the Debtor employed 8 or more persons during each week day of that period, with the exception of holidays and some Saturdays.

7. The Debtor has had no employees since certain of its assets were sold to Intercontinent Aircraft Corporation as of the close of business on May 16, 1941.

EUGENE HARPOLE,

Special Attorney,

Bureau of Internal Revenue.

By ARMOND MONROE JEWELL,
E. H.

Assistant United States
Attorney.

CHARLES PECKHAM,

Attorney for Debtor.

ARTHUR H. DEIBERT,

Attorney for Charles T.

Russell, individually.

[Endorsed]: Filed Aug. 2, 1941. [28]

[Title of District Court and Cause.]

MEMORANDUM OF CONCLUSIONS,

Judge Hollzer, Oct. 17, 1941

It appearing that the Collector of Internal Revenue filed a claim herein for Federal Unemployment taxes in the sum of \$1338.23 covering the period extending from January 1, 1941 to May 16, 1941 inclusive; and

It further appearing that said claim has been submitted upon the following agreed statement of facts, to-wit:

1. The Debtor Copartnership of Berlin and Russell Aircraft Machine and Manufacturing Company was formed on November 7, 1940.

2. The payroll of the Debtor from November 7, to December 31, 1940, was \$2,220.66, and if any Unemployment Tax to the United States and to the State of California jointly was incurred by the Debtor during the said period, said tax was in the amount of \$66.62.

3. That for the first quarter of the calendar year 1941, said quarter ending March 31, 1941, the payroll of the Debtor was \$42,400.17, and if any Unemployment Tax to the United States and to the State of California jointly was incurred by the Debtor during the said period, said tax was in amount of \$1,272.01.

4. That for the period April 1, 1941, to May 16, 1941, inclusive, (the latter date being the date on which the sale of certain of the assets of the Debtor to [30] Intercontinent Aircraft Corporation became effective by order of this Court, since which time the Debtor has not had any employees) the payroll was \$23,828.88, and if any Unemployment Tax to the United States and to the State of California jointly was incurred by the Debtor during the said period, said tax was in the amount of \$714.87.

5. The Debtor did not file any returns under the Federal Unemployment Tax Act or under the California Unemployment Insurance Act for the reason that it believed it was not liable for the said tax under either of said Acts.

6. From January 1, 1941, to May 16, 1941, inclusive, the Debtor employed 8 or more persons during each week day of that period, with the exception of holidays and some Saturdays.

7. The Debtor has had no employees since certain of its assets were sold to Intercontinent Aircraft Corporation as of the close of business on May 16, 1941.

The Court Concludes that under the provisions of Sections 1600 and 1607 (a) of the Internal Revenue Code the calendar year extending from January 1 to December 31, inclusive, constitutes the taxable year.

The Court Further Concludes that under the aforementioned provisions of the Internal Revenue Code a week constitutes a period of seven days beginning Sunday morning and ending the following Saturday night and wholly within one and the same calendar year, that a day may be counted as being a day during a taxable (calendar) year only in the event that such day is one of the seven days of one and the same week falling entirely within one and the same calendar year and that the twenty weeks period specified in said Code means twenty calendar weeks, each week beginning on Sunday morning and ending the following Saturday night, [31] and all of such weeks falling wholly within one and the same calendar year.

The Court Further Concludes that since January 1, 1941 fell on a Wednesday and May 16, 1941 fell

on a Friday, such period extending from January 1, 1941 to May 16, 1941, inclusive, constituted less than 20 weeks within the calendar year of 1941.

The Court Further Concludes that said debtor is not subject to the Federal Employment Tax Act, and that the aforementioned claim should be denied.

MINUTE ORDER

For the reasons set forth in the Memorandum of Conclusions this day filed it is ordered that counsel for the debtor prepare and submit an order in conformity with the same, serving a copy thereof on counsel for the Collector of Internal Revenue.

[Endorsed]: Filed Oct. 17, 1941. [32]

In the United States District Court
Southern District of California
Central Division
No. 38,270-H Bkey

In the Matter of BERLIN AND RUSSELL AIR-
CRAFT MACHINE AND MANUFACTUR-
ING COMPANY, a co-partnership,
Debtor.

ORDER PROVIDING THAT DEBTOR IS NOT
SUBJECT TO FEDERAL EMPLOYMENT
TAX ACT FOR UNEMPLOYMENT TAXES

The above-entitled matter having come on further to be heard on Saturday the 2nd day of

August, 1941, at the hour of 10 o'clock a.m., and notice of said hearing having been given to the Bureau of Internal Revenue of the United States of America, and such notice being deemed by this Court to be sufficient under the circumstances and it having been stipulated by the Debtor through its attorney, Charles Peckham; Charles T. Russell, individually, through his attorney Arthur H. Deibert; the Bureau of Internal Revenue of the United States of America, which said Bureau through the Collector of Internal Revenue has heretofore filed its claim herein for unemployment taxes, through its special attorney Eugene Harpole and also Armond Monroe Jewell, Assistant United States Attorney that:

1. The Debtor Copartnership of Berlin and Russell Aircraft Machine and Manufacturing Company was formed on November 7, 1940.

2. The payroll of the Debtor from November 7, to December 31, 1940, was \$2,220.66, and if any Unemployment Tax to the United States and to the State of California jointly was incurred by the Debtor during the said period, said tax was in the amount of \$66.62.

3. That for the first quarter of the calendar year 1941, said quarter ending March 31, 1941, the payroll of the [34] *of the* Debtor was \$42,400.17, and if any Unemployment Tax to the United States and to the State of California jointly was incurred by the Debtor during the said period, said tax was in amount of \$1,272.01.

4. That for the period April 1, 1941, to May 16, 1941, inclusive, (the latter date being the date on which the sale of certain of the assets of the Debtor to Intercontinent Aircraft Corporation became effective by order of this Court, since which time the Debtor has not had any employees) the payroll was \$23,828.88, and if any Unemployment Tax to the United States and to the State of California jointly was incurred by the Debtor during the said period, said tax was in the amount of \$714.87.

5. The Debtor did not file any returns under the Federal Unemployment Tax Act or under the California Unemployment Insurance Act for the reason that it believed it was not liable for the said tax under either of said Acts.

6. From January 1, 1941, to May 16, 1941, inclusive, the Debtor employed 8 or more persons during each week day of that period, with the exception of holidays and some Saturdays.

7. The Debtor has had no employees since certain of its assets were sold to Intercontinent Aircraft Corporation as of the close of business on May 16, 1941.

And the above-entitled Court having ordered that this said matter of Unemployment Taxes as per the said claim filed herein by the Collector of Internal Revenue be submitted on written briefs and written briefs having been submitted within the time allowed by: (a) the Debtor, and Charles T. Russell, individually, and (b) the Bureau of

Internal Revenue of the United States Government, and the above-entitled matter having been duly and regularly submitted, and the Honorable Harry A. Hollzer, Judge of the above-entitled Court, having made and rendered his memorandum of conclusions on the 17th day of October, [35] 1941,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that under the provisions of Sections 1600 and 1607 (a) of the Internal Revenue Code the calendar year extending from January 1 to December 31, inclusive, constitutes the taxable year.

It Is Further Ordered, Adjudged and Decreed that under the aforementioned provisions of the Internal Revenue Code a week constitutes a period of seven days beginning Sunday morning and ending the following Saturday night and wholly within one and the same calendar year, that a day may be counted as being a day during a taxable (calendar) year only in the event that such day is one of the seven days of one and the same week falling entirely within one and the same calendar year and that the twenty weeks period specified in said Code means twenty calendar weeks, each week beginning on Sunday morning and ending the following Saturday night, and all of such weeks falling wholly within one and the same calendar year.

It Is Further Ordered, Adjudged and Decreed that since January 1, 1941 fell on a Wednesday and May 16, 1941 fell on a Friday, such period extending from January 1, 1941 to May 16, 1941, inclusive,

constituted less than 20 weeks within the calendar year of 1941.

It Is Further Ordered, Adjudged and Decreed that the Debtor herein is not subject to the Federal Employment Tax Act and that the claim of the Collector of Internal Revenue heretofore filed herein for unemployment taxes be, and the same is, hereby denied.

Dated this 31 day of October, 1941.

H. A. HOLLZER,

Judge of the United States District Court. [36]

Approved as to Form:

CHARLES PECKHAM,

Attorney for Debtor.

ARTHUR H. DEIBERT,

Attorney for Charles T. Russell,
Individually.

EUGENE HARPOLE,

Special Attorney, Bureau of Internal
Revenue.

ARMOND MONROE JEWELL—E. H.,

Assistant United States Attorney.

O'MELVENY & MYERS,

By MAYNARD J. TOLL,

Attorneys for Intercontinent Aircraft
Corporation.

[Endorsed]: Filed Nov. 3, 1941. [37]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the United States of America hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the Order entered in the above entitled debtor proceeding on October 31, 1941, which Order provided that the above entitled debtor is not subject to the Federal Unemployment Tax Act or to unemployment taxes .

Dated: This 19th day of November, 1941.

WM. FLEET PALMER,

United States Attorney,

E. H. MITCHELL,

Asst. U. S. Attorney,

EUGENE HARPOLE,

Special Attorney, Bureau of
Internal Revenue.

By EUGENE HARPOLE,

Attorneys for United States
of America.

[Endorsed]: Filed Nov. 21, 1941, R. S. Zimmerman, Clerk. By Edmund L. Smith.

Mailed copies to Debtor's Atty. & Atty. for Russell. E. L. S. [39]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET
CAUSE ON APPEAL

It Is Hereby Stipulated and Agreed by and between the attorneys for the United States of America and the debtor that, subject to the approval of the Court, the time within which to file the record and docket the above entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit be and the same is hereby extended to and including the 17th day of February, 1942.

Dated: This 30th day of December, 1941.

WM. FLEET PALMER,
United States Attorney,
E. H. MITCHELL,
Asst. U. S. Attorney,
EUGENE HARPOLE,
Special Attorney, Bureau of
Internal Revenue.

By EUGENE HARPOLE,
Attorneys for United States
of America. [41]

CHARLES PECKHAM,
Attorney for Debtor.
ARTHUR H. DEIBERT,
Attorney for Charles T. Rus-
sell, Individually.

O'MELVENY & MYERS
By MAYNARD J. TOLL,
Attorney for Intercontinent
Aircraft Corporation.

It Is So Ordered this 30th day of December, 1941.

HARRY A. HOLLZER,

United States District Judge.

[Endorsed]: Filed Dec. 30, 1941. [42]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK.

I, R. S. Zimmerman, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 42 inclusive contain full, true and correct copies of Petition for Arrangement; Order Approving Petition, that Petitioners Remain in Possession and Restraining Order; Claim of Collector of Internal Revenue; Amended Claim; Order for Hearing; Stipulation of Facts; Memorandum of Conclusions and Order; Order Disallowing Claim; Notice of Appeal; Order Extending Time to Docket Appeal; and Designation of Contents of Record on Appeal which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of the said District Court this day of February, A. D. 1942.

[Seal]

R. S. ZIMMERMAN,

Clerk,

By: EDMUND L. SMITH,

Deputy.

[Endorsed]: No. 10049. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Berlin and Russell Aircraft Machine and Manufacturing Company, a co-partnership, Charles T. Russell and Intercontinent Aircraft Corporation, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed: February 10, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10049

In the Matter of

BERLIN AND RUSSELL AIRCRAFT
MACHINE AND MANUFACTURING
COMPANY, a co-partnership,

Debtor.

APPELLANT'S STATEMENT OF POINTS
TO BE URGED

1. The District Court erred in entering its order dated October 31, 1941, disallowing the claim filed

in the bankruptcy proceeding on behalf of the United States for Federal Unemployment taxes in the sum of \$1,338.23.

2. The District Court erred in failing and refusing to hold that the Debtor was an employer for the taxable year 1941 within the meaning of Section 1607(a) of the Social Security Act Amendments of 1939 by reason of having in its employ eight or more individuals during the required periods of time.

Dated: This 6th day of February, 1942.

WM. FLEET PALMER,
United States Attorney,
E. H. MITCHELL,
Asst. U. S. Attorney,
EUGENE HARPOLE,
Special Attorney,
Bureau of Internal Revenue,
By EUGENE HARPOLE,
Attorneys for Appellant,
United States of America.

Received copy of the within Appellant's Statement of Points to Be Urged this 9th day of February, 1942.

CHARLES PECKHAM,
Attorney for Debtor
ARTHUR DEIBERT,

By CGD
Atty. for Chas. T. Russell,
individually.

Received copy of the within document Feb. 9, 1942.

O'MELVENY & MYERS,

By (Invalid unless countersigned)

DTG

[Endorsed]: Filed Feb. 10, 1942. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD FOR PRINTING

The Appellant designates the following as those parts of the Record necessary for the consideration of the points upon which the Appellant intends to rely in this appeal and for printing:

Page 2 of the Record (omitting the title of Court and Cause); pages 3, 4 and 5 of the Record; page 6 of the Record, omitting lines 29 to 32 of said page 6; pages 11 and 12 of the Record; page 13 of the Record (omitting the title of Court and Cause); page 14 of the Record, said pages 2 to 14, inclusive, consisting of a partnership petition for an arrangement under Chapter XI.

Page 17 of the Record (omitting the title of Court and Cause); pages 18 and 19 of the Record, said pages 17 to 19, inclusive, consisting of an Order approving said partnership petition for an arrangement under Chapter XI.

Page 21 of the Record, but omitting therefrom the printed portions of said page composing the

paragraph commencing with the words "Taxable wages \$....." and ending with the words "United States in accordance with their priority" and omitting all matter appearing on page 22 of the Record, except the filing endorsements, said pages 21 and 22 consisting of a tax claim filed on behalf of the United States.

Page 23 of the Record, but omitting therefrom the printed portions of said page composing the paragraph commencing with the words "Taxable wages \$....." and ending with the words "United States in accordance with their priority" and omitting all matter appearing on page 24 of the Record, except the filing endorsements, said pages 23 and 24 consisting of an amended tax claim filed on behalf of the United States.

Page 25 of the Record (omitting the title of Court and Cause) consisting of an order for hearing on the question of whether the debtor is liable to Federal Unemployment Tax.

Pages 27 and 28 of the Record (omitting the title of Court and Cause on said page 27), said pages 27 and 28 consisting of a Stipulation of Facts.

Pages 30, 31 and 32 of the Record, consisting of a Memorandum of Conclusions of the District Judge, but omitting the title of Court and Cause from said page 30.

Pages 34, 35, 36 and 37 of the Record, consisting of the Order herein appealed from, but omitting the title of Court and Cause on said page 34.

Page 39 of the Record, consisting of Notice of Appeal, but omitting the title of Court and Cause.

Pages 41 and 42 of the Record, consisting of an Order extending the time to docket cause on appeal, but omitting the title of Court and Cause on said page 41.

Certificate of the Clerk of the District Court.

Dated: This 6th day of February, 1942.

WM. FLEET PALMER,

United States Attorney,

E. H. MITCHELL,

Asst. U. S. Attorney,

EUGENE HARPOLE,

Special Attorney,

Bureau of Internal Revenue,

By EUGENE HARPOLE,

Attorneys for Appellant,

United States of America.

Received copy of the within Designation of Record for Printing this 9th day of February, 1942.

CHARLES PECKHAM,

Attorney for Debtor

ARTHUR DEIBERT

By CGD

Atty. for Charles T. Russell,
individually.

Received copy of the within document Feb. 9, 1942.

O'MELVENY & MYERS,

By (Invalid unless countersigned)

DTG

[Endorsed]: Filed Feb. 10, 1942.

No. 10049.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

BERLIN AND RUSSELL AIRCRAFT MACHINE AND MANUFACTURING COMPANY, a co-partnership, CHARLES T. RUSSELL and INTERCONTINENT AIRCRAFT CORPORATION,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR THE UNITED STATES.

SAMUEL O. CLARK, JR.,

Assistant Attorney General.

SEWALL KEY,

GERALD L. WALLACE,

MICHAEL H. CARDOZO, IV,

Special Assistants to the Attorney General,

Department of Justice, Washington, D. C.

WM. FLEET PALMER,

United States Attorney.

E. H. MITCHELL,

Assistant United States Attorney.

EUGENE HARPOLE,

Special Attorney,

Bureau of Internal Revenue,

United States Post Office and Court House
Building, Los Angeles.

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No. 10049.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

BERLIN AND RUSSELL AIRCRAFT MACHINE AND MANUFACTURING COMPANY, a co-partnership, CHARLES T. RUSSELL and INTERCONTINENT AIRCRAFT CORPORATION,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR THE UNITED STATES.

Opinion Below.

The only previous opinion in this case is the memorandum of conclusions of the District Court [R. 22-25], which is not reported.

Jurisdiction.

This appeal involves federal unemployment taxes for the year 1941 in the amount of \$1,986.88. [R. 19-21.] The taxpayer filed in the District Court a petition dated April 3, 1941, asking that proceedings might be had in accordance with the provisions of Chapter XI of the Bankruptcy Act of 1898, c. 541, 30 Stat. 544, as amended by the Act of June 22, 1938, c. 575, 52 Stat. 840. [R. 2-10.] The District Court granted this petition by order filed April 4, 1941. [R. 15.] On August 21, 1941, the United States filed an amended claim against the debtor in the District Court for the taxes involved herein. [R. 17-18.] The jurisdiction of the District Court to pass on such claim is found in Sections 2a(2) and 351 of the Bankruptcy Act of 1898, as amended by the Act of June 22, 1938. The decision of the District Court was filed November 3, 1941. [R. 29.] The notice of appeal was filed November 21, 1941 [R. 30], and the case comes to this Court pursuant to the provisions of Section 128 (c) of Judicial Code and Section 24 of the Bankruptcy Act of 1898, as amended by the Act of June 22, 1938.

Question Presented.

In 1941 the taxpayer employed eight or more persons from January 1 to May 16, inclusive. Did the taxpayer thereby become an "employer", as that term is defined in Section 1607 (a) of the Internal Revenue Code, by virtue of the employment of eight or more persons on each of some 20 days during the year, each day being in a different calendar week?

Statute and Regulations Involved.

Internal Revenue Code:

SEC. 1600.¹ RATE OF TAX.

Every employer (as defined in section 1607 (a)) shall pay for the calendar year 1939 and for each calendar year thereafter an excise tax, with respect to having individuals in his employ, equal to 3 per centum of the total wages (as defined in section 1607 (b)) paid by him during the calendar year with respect to employment (as defined in section 1607 (c)) after December 31, 1938. (U.S.C., 1940 ed., Title 26, Sec. 1600.)

SEC. 1607.² DEFINITIONS.

When used in this subchapter—

(a) *Employer*.—The term “employer” does not include any person unless on each of some twenty days during the taxable year, each day being in a different calendar week, the total number of individuals who were employed by him in employment for some portion of the day (whether or not at the same moment of time) was eight or more. * * * (U.S.C., 1940 ed., Title 26, Sec. 1607.)

SEC. 1609. RULES AND REGULATIONS.

The Secretary and the Social Security Board, respectively, shall make and publish such rules and regulations, not inconsistent with this subchapter, as may be necessary to the efficient administration of the

¹As amended by the Social Security Act Amendments of 1939, c. 666, 53 Stat. 1360, Sec. 608.

²As amended by the Social Security Act Amendments of 1939, c. 666, 53 Stat. 1360, Sec. 614.

functions with which each is charged under this subchapter. The Commissioner, with the approval of the Secretary, shall make and publish rules and regulations for the enforcement of this subchapter, except sections 1602 and 1603. (U.S.C., 1940 ed., Title 26, Sec. 1609.)

Treasury Regulations 107, relating to the excise tax on employers under the Federal Unemployment Tax Act:

SEC. 403.205. *Who are employers.*—Every person who employs eight or more employees in employment within the meaning of section 1607 (c) and (d) of the Act on a total of 20 or more calendar days during a calendar year, each such day being in a different calendar week, is with respect to such year an employer subject to the tax.

The several weeks in each of which occurs a day on which eight or more employees are employed need not be consecutive weeks. It is not necessary that the employees so employed be the same individuals; they may be different individuals on each day. Neither is it necessary that the eight or more employees be employed at the same moment of time or for any particular length of time or on any particular basis of compensation. It is sufficient if the total number of employees employed during the 24 hours of a calendar day is eight or more.

Statement.

The facts are stated in a stipulation of facts. [R. 20-22.]

The taxpayer is a co-partnership which was organized on November 7, 1940. During the period from January 1, 1941, to May 16, 1941, inclusive, the taxpayer employed eight or more persons on each weekday, with the exception of holidays and some Saturdays. It was stipulated that the taxpayer had no employees after May 16, 1941, when it ceased to do business. [R. 21-22.] It did not file any returns under the Federal Unemployment Tax Act. Its payroll from January 1 through May 16 amounted to \$66,229.05, and it was stipulated that, if any federal unemployment tax was due, the amount of the tax (based on three percent of the payroll) was \$1,986.88. [R. 21.]

In April, 1941, the taxpayer petitioned for an arrangement under Chapter XI of the Bankruptcy Act, and the petition was granted by order of the United States District Court dated April 4, 1941. [R. 13-15.] The United States filed a claim for unemployment taxes for the period from January 1, 1941, to May 16, 1941 [R. 17-18], and the taxpayer opposed their payment on the ground that no taxes were owed. [R. 19.] After a hearing before the District Court, an order was entered holding that the taxpayer had not employed eight or more persons during 20 days of the year, each in a different calendar week. [R. 28-29.] The United States has appealed from this decision. [R. 30.]

Statement of Points to Be Urged.

1. The District Court erred in refusing to hold that the taxpayer was an "employer" during the taxable year 1941, within the meaning of Section 1607 (a) of the Internal Revenue Code.

2. The District Court erred in disallowing the claim filed on behalf of the United States for federal unemployment taxes.

Summary of Argument.

The taxpayer employed eight or more persons on at least one day in each week during a period of 18 full calendar weeks of the year and on at least one day during the calendar week preceding this period and one day during the week succeeding such period. Therefore, the taxpayer employed eight or more persons on each of some 20 days during the taxable year, each day being in a different calendar week. This made the taxpayer an employer under the Federal Unemployment Tax Act, and it owed the taxes claimed herein.

ARGUMENT.

The Taxpayer Employed Eight or More Persons on Some 20 Days, Each in a Different Week, Within the Taxable Year, and Was an "Employer" Under the Act.

The only question in this case is whether the partnership, hereinafter referred to as "the taxpayer," is an "employer" as that word is defined in Section 1607 (a) of the Internal Revenue Code, as amended. If so, it was required by Section 1600 of the amended Code to pay three percent of its payroll as an unemployment tax. The taxpayer was an "employer" if, during the calendar year 1941, which corresponds to the taxable year, it employed eight or more persons on each of some 20 days, each day being in a different calendar week. It has been stipulated that eight or more persons were employed by the taxpayer during the entire period from January 1, 1941, to May 16, 1941, inclusive. The taxpayer claims, and the court below agreed, that during this period there were not 20 such days within the taxable year, "each day being in a different calendar week." This position is based on the theory that all seven days of the different calendar weeks must be within the taxable year in order to be a "different calendar week" under the Act.

The period of employment began on Wednesday, January 1, 1941.³ Since the four days from Wednesday, January 1, to Saturday, January 4, do not constitute an

³For the convenience of the Court, a calendar containing the first five months of 1941 is reproduced in the Appendix, *infra*, p. 13.

entire calendar week, it is contended that no day of that week may be counted in determining whether the taxpayer comes within the definition. The first full calendar week of the year began on Sunday, January 5, 1941. From that date until May 16, 1941, there were 18 full weeks and six days of the nineteenth week. Consequently, unless one of the first four days of the year can be counted as one of the 20 requisite days, the taxpayer is not an "employer", and does not owe the taxes claimed.

The Government's position is that a week need not be wholly within the taxable year in order to be counted. It cannot be denied that 18 full calendar weeks were covered in the period involved. Therefore, there were at least 18 days, each in a different calendar week, on which eight or more persons were employed. In addition, there were eight or more persons employed on at least one day in the period prior to Sunday, January 5, 1941, and that period certainly was in a different week from the 18 following weeks. Similarly, in the period following midnight, Saturday, May 10, 1941, there was at least one such day not within any of those 18 weeks, and the taxpayer apparently does not object to counting that day. Every day must be in some week, and these two additional days at each end of, but not in, the 18-week period must have been in two additional weeks. The statute only requires that the days, in order to be counted, fall within the taxable year and in different calendar weeks. Certainly January 1 to January 4, were days within some calendar week. They were not in the calendar week beginning on January

5, and hence must have been in a "different calendar week." Consequently, there were 20 days, each in a different calendar week, during which the taxpayer employed eight or more persons.

If the rule for which the Government contends is not followed, the definition would unfairly discriminate against taxpayers whose situations were actually identical. For example, suppose a taxpayer had started to employ eight or more persons on Wednesday, January 8, 1941, one week later than the taxpayer involved herein. Suppose further that this taxpayer continued to employ eight or more persons through Friday, May 23, 1941, one week later than the concluding date in this case. From a practical standpoint, such a taxpayer would be identically situated with the taxpayer in this case, and should bear the same tax burden. However, the rule for which the taxpayer herein contends would exempt him from taxes while including the other as an employer.

There can be no doubt of the validity of the method of classification contained in the definition in Section 1607 (a). The Supreme Court has upheld it. *Carmichael v. Southern Coal Co.*, 301 U. S. 495; *Steward Machine Co. v. Davis*, 301 U. S. 548.

The interpretation for which the Government contends has been set forth in S. S. T. 414, 1941-1 Cum. Bull. 412. It was sustained by the United States District Court for the District of Massachusetts in *Garage Service Corp. v. Hassett*, decided January 12, 1942, not officially reported, but found in C. C. H., Unemployment Insurance Service,

par. 8974. In that case the tax period began on Friday, January 1, 1937, and ended on Tuesday, May 11, 1937. The court held that Friday or Saturday, January 1 or 2, could be counted as the first of the requisite 20 days, despite the fact that part of the calendar week in which they fell was in the previous taxable year. As in this case, there were at least two days on which eight or more persons were employed on either side of a period of 126 days, covering 18 full calendar weeks. In his opinion in that case Judge Ford made the following pertinent observations:

I cannot agree with the plaintiff's contention that the calendar week from which a day is taken must fall within the taxable year. The statute merely requires employment on a day within the taxable year. Such a day, provided it is within the taxable year, may be taken from any calendar week, whether the calendar week is wholly within the calendar year or not, as is the case here of the week in which January 2 fell. The statute omits the words "during the taxable year" after the words "calendar week". I can think of no reason to infer that Congress meant them to be implied. If the intention was that the statute should be construed as the taxpayer argues, it is apparent that Congress could have assured comprehension of their meaning by inserting the phrase "during the taxable year" after "calendar week" instead of after "days". * * *

Conclusion.

The decision below, holding that the taxpayer was not an employer under Section 1607 (a) of the Internal Revenue Code, as amended, was erroneous, and should be reversed.

Respectfully submitted,

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April, 1942.

APPENDIX.

1941	Sun.	Mon.	Tue.	Wed.	Thr.	Fri.	Sat.
Jan.	(1)	2	3	4
	5	6	7	8	9	10	11
	12	13	14	15	16	17	18
	19	20	21	22	23	24	25
	26	27	28	29	30	31	....
Feb.	....	....	....	....	....	....	1
	2	3	4	5	6	7	8
	9	10	11	12	13	14	15
	16	17	18	19	20	21	22
	23	24	25	26	27	28	....
Mar.	....	....	....	....	....	....	1
	2	3	4	5	6	7	8
	9	10	11	12	13	14	15
	16	17	18	19	20	21	22
	23	24	25	26	27	28	29
	30	31	....	....	....	....	....
Apr.	....	....	1	2	3	4	5
	6	7	8	9	10	11	12
	13	14	15	16	17	18	19
	20	21	22	23	24	25	26
	27	28	29	30	....	....	....
May	....	....	....	....	1	2	3
	4	5	6	7	8	9	10
	11	12	13	14	15	(16)	17
	18	19	20	21	22	23	24
	25	26	27	28	29	30	31

No. 10049

IN THE

18
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

BERLIN AND RUSSELL AIRCRAFT MACHINE AND MANUFACTURING COMPANY, a co-partnership, CHARLES T. RUSSELL and INTERCONTINENT AIRCRAFT CORPORATION,

Appellees.

BRIEF FOR APPELLEES.

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FILED

MAY 1 - 1942

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No. 10049

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

BERLIN AND RUSSELL AIRCRAFT MACHINE AND MANUFACTURING COMPANY, a co-partnership, CHARLES T. RUSSELL and INTERCONTINENT AIRCRAFT CORPORATION.

Appellees.

BRIEF FOR APPELLEES.

Opinion Below.

The previous opinion in this case is the Memorandum of Conclusions of the District Court [R. 22-25], which is not reported.

Jurisdiction.

This appeal involves Federal Unemployment taxes for the year 1941 only and in the amount of \$1,986.88. [R. 19-21.] The taxpayer filed in the District Court a petition dated April 3, 1941, asking that proceedings might be had in accordance with the provisions of Chapter XI

of the Bankruptcy Act of 1898, c. 541, 30 Stat. 544, as amended by the Act of June 22, 1938, c. 575, 52 Stat. 840. [R. 2-10.] The District Court granted this petition by order filed April 4, 1941. [R. 15.] On August 21, 1941, the United States filed an amended claim against the debtor in the District Court for certain taxes including the Federal Unemployment taxes involved herein. [R. 17-18.] The jurisdiction of the District Court to pass on such claim is found in Sections 2(a)(2) and 351 of the Bankruptcy Act of 1898 as amended by the Act of June 22, 1938. The decision of the District Court was filed November 3, 1941. [R. 29.] The notice of appeal was filed November 21, 1941 [R. 30], and the case comes to this Court pursuant to the provisions of Section 128(c) of Judicial Code and Section 24 of the Bankruptcy Act of 1898 as amended by the Act of June 22, 1938.

Question Presented.

The sole issue is whether the debtor is an "employer" within the definition of that term in Section 1607(a) of the Internal Revenue Code, the determination of such question being dependent upon whether the debtor employed eight or more persons on each of some twenty days during the taxable year 1941, each day being in a different calendar week. During 1941 the debtor employed eight or more persons from January 1 to May 16, inclusive, but employed none after the latter date.

Statutes and Regulations.

The pertinent portions of the statutes and regulations are set forth in the appendix, *infra*, pages 31 to 33.

Statement.

The facts are contained in a stipulation of facts. [R. 20-22.] The debtor is a co-partnership organized November 7, 1940. During the period from January 1, 1940 to May 16, 1941, inclusive, the debtor employed eight or more persons on each week-day with the exception of holidays and some Saturdays. The parties stipulated that debtor had no employees after May 16, 1941, when it ceased to do business. [R. 21-22.] It did not file any returns under the Federal Unemployment Tax Act or under the California Unemployment Insurance Act for the reason that it believed it was not liable for the said tax under either of said Acts. Its payroll from January 1 through May 16, 1941, amounted to \$66,229.05 and it was stipulated that if any unemployment tax to the United States and to the State of California jointly was incurred by the debtor during said period, said tax was in the amount of \$1,986.88. [R. 21.]

In April, 1941, the debtor petitioned for an arrangement under Chapter XI of the Bankruptcy Act, which petition was granted by order of the United States District Court dated April 4, 1941. [R. 13-15.] The United States filed a claim for unemployment taxes for the period January 1 to May 16, 1941 and the taxpayer opposed their payment on the ground that no taxes were owed. [R. 17-19.] After a hearing before the District Court, an order was entered holding that the debtor had not employed eight or more persons during twenty days of the year, each in a different calendar week; that under the provisions of Sections 1600 and 1607(a) of the Internal Revenue Code, the calendar year extending from January 1 to December 31, inclusive, constitutes the taxable year; that

under the aforesaid provisions of the Internal Revenue Code a week constitutes a period of seven days beginning Sunday morning and ending the following Saturday night and wholly within one and the same calendar year; that a day may be counted as being a day during a taxable (calendar) year only in the event that such day is one of the seven days of one and the same week falling entirely within one and the same calendar year and that the twenty weeks period specified in said Code means twenty calendar weeks each week beginning on Sunday morning and ending the following Saturday night, and all of such weeks falling wholly within one and the same calendar year; that since January 1, 1941, fell on a Wednesday and May 16, 1941, fell on a Friday, such period extending from January 1, 1941, to May 16, 1941, inclusive, constituted less than twenty weeks within the calendar year of 1941; that the debtor is not subject to the Federal Unemployment Tax Act, and that the claim of the Collector of Internal Revenue filed for unemployment taxes be denied. [R. 28-29.] From this decision the United States has appealed. [R. 30.]

Summary of Argument.

The debtor is not subject to the Federal Unemployment Tax Act for the reason that it did not employ eight or more persons on each of some twenty days during the year 1941, each day being in a different calendar week, inasmuch as the different calendar weeks specified in Section 1607(a) of the Internal Revenue Code mean full calendar weeks, each week beginning on Sunday morning and ending the following Saturday night, which calendar weeks must be wholly within one and the same calendar year.

ARGUMENT.

The Debtor Did Not Employ Eight or More Persons on Each of Some Twenty Days During the Calendar Year 1941, in Different Calendar Weeks Wholly Within That Calendar Year, and Was Therefore Not an Employer Under the Act.

The sole question involved in this case is whether the debtor co-partnership is an "employer" within the definition of that term in Section 1607(a) of the Internal Revenue Code.

One of the facts stipulated by the parties is that eight or more persons were employed by the taxpayer during the period January 1 to May 16, 1941, inclusive, with the exception of holidays and some Saturdays. The debtor claims, and it has been upheld by the United States District Court, that during that period there were not twenty such days within the calendar year 1941, "each day being in a different calendar week." The Court below agreed that under the provisions of Section 1607(a) of the Internal Revenue Code a day may be counted as being one of the twenty days provided by that Section of the Code only in the event that such day is one of seven days of one and the same week falling *wholly* within one and the same calendar year, and that the twenty weeks so specified mean twenty calendar weeks, each week beginning on Sunday morning and ending the following Saturday night, and all of such weeks falling wholly within one and the same calendar year.

It is at once apparent from a reading of Section 1600 of the Code and Section 403.205 of Treasury Regulations 107 that in providing for a Federal Unemployment Tax, Congress legislated with reference to *calendar* years as the

taxable period, specified as "each calendar year," and the tax is laid on the total wages paid by an employer in "each calendar year." We therefore come to a consideration of the question here involved with a clear admonition from Congress that it was dealing only with wages paid by an employer within a calendar year, and that the calendar year is the basis for all computations of both wages and time of employment in order to determine the liability of any employer for such tax.

It will be noted that under Section 403.205 of the Treasury Regulations 107, the Treasury stresses the fact that the twenty calendar days referred to in Section 1607(a) of the Code mean full calendar days as it refers to "the 24 hours of a calendar day." By the same token the law must have intended to deal with full calendar weeks and, the tax being on the basis of a calendar year, such full calendar weeks within each separate calendar year.

It should be observed that in Section 1600 of the Internal Revenue Code, *supra*, an employer, as defined in Section 1607(a) of the Code, is required to pay "for each *calendar year*" a tax "equal to three per centum of the total wages (as defined in Section 1607(b)) paid by him during the calendar year * * *".

It is obvious at the outset, therefore, that Congress, in enacting legislation imposing a Federal Unemployment Tax, selected the calendar year beginning January 1 and ending December 31 as the taxable year, and as the exclusive period of time during which the wages paid by an employer to an employee were to be so taxed, as well as the period for determining the question whether an employer "employed * * * in employment" 8 or more

persons on each of some 20 days, each day being in a different calendar week during the calendar year.

Therefore, the fixing of the calendar year by Congress as the taxable year, and as the period during which the tax of 3% is to be levied upon the total wages paid by an employer to his employees, would definitely seem to preclude the use of any number of days in either a preceding or succeeding calendar year for the purpose of determining either (1) the statutory period of 20 weeks within each calendar year, or (2) wages paid in the calendar year during which such tax liability, if any, is incurred.

It is, of course, well established that Federal taxation is on an annual basis, and that a taxable year is a calendar year unless otherwise specified. It is worthy of note, however, that in the legislation imposing an unemployment tax, the Congress, in Section 1600, *supra*, left no doubt on this point by specifically confining the application of the tax to "each calendar year" and at the rate of 3% of the total wages "*paid by him (the employer) during the calendar year.*"

In order to ascertain the real intent of Congress in enacting legislation the best source of information is the legislative history of the particular enactment. The courts of this country, including the Supreme Court of the United States, where a doubt has arisen as to the legislative meaning, repeatedly have gone back to the reports of legislative and Congressional committees to determine if possible what the legislators really intended. An examination of such history of the Federal Unemployment Tax Act, with which we are here concerned, is particularly pertinent and enlightening.

This legislation was first considered by the Committee on Ways and Means of the House of Representatives under the title "The Social Security Bill," and on April 5, 1935, the Chairman of the Committee on Ways and Means submitted to the House of Representatives Report No. 615 on said Bill. In that Report, the Committee made the following significant statement:

"Definitions.

"Section 907: The definitions set up by this section are *very important* in connection with the *application* and *scope* of the entire title. They are as follows:

"(a) Employer: The term 'Employer' includes only those persons who, in each of *at least 20 weeks in the year*, have a total number of 10 or more employees. This means that if on 1 day a week for 20 weeks (which need not be consecutive) there are 10 employees, the employer is covered. The employees (who need not necessarily be the same people) need not all be employed at the same moment; it is enough if during the day the total number is at least 10. The employees are not counted unless they are employed in 'employment' as defined in this section." (Italics supplied.)

The Senate Finance Committee in its Report No. 628, dated May 13, 1935, on the same Bill, made the following statement:

"Definitions.

"Section 907: The definitions set up by this section are *very important* in connection with the *application* and *scope* of the entire title. They are as follows:

“(a) Employer: The term ‘employer’ includes only those persons who, in each of *at least 13 weeks in the year*, have a total number of 4 or more employees. (In the House bill it was 20 weeks and 10 or more employees.) This means that if on 1 day a week for 13 weeks (which need not be consecutive) there are 4 employees, the employer is covered. The employees (who need not necessarily be the same people) need not all be employed at the same moment; it is enough if during the day the total number is at least 4. The employees are not counted unless they are employed in ‘employment’ as defined in this section.” (Italics supplied.)

Section 907 of the original Social Security Bill eventually became Section 1607 of the Internal Revenue Code, as amended.

From the above quoted excerpts from House and Senate Committee reports it will be seen that the House originally defined an employer as a person who in each of *at least 20 weeks in the calendar year* has a total number of 10 or more employees, while the Senate provided that an employer was a person who in each of *at least 13 weeks in the calendar year* has a total of 4 or more employees. Clearly a week to be “in the year” must be in the calendar year.

Because of these and other differences in the respective bills which passed the House and the Senate, a conference of the House Ways and Means Committee and the Senate Finance Committee was arranged and on July 16, 1935, the Committee of Conference submitted a report, making cer-

tain recommendations to compose the differences in the bills passed by the respective Houses, and among their recommendations, which were adopted, appears the following:

“Amendments nos. 90 and 91: The House bill provided that the term ‘employment’, as used in title IX, should not include any person unless on each of some 20 days during the taxable year, each day being in a different calendar week, the total number of individuals who were in his employ for some portion of the day (whether or not at the same moment of time) was 10 or more. The Senate amendments reduce the number of days from 20 to 13, and the number of individuals from 10 to 4. The Senate recedes on amendment numbered 90, and the House recedes on amendment numbered 91 with an amendment fixing the number of individuals at eight.”

It will be observed that amendment number 90 was a Senate amendment, reducing the number of days from 20 to 13 and the number of individuals from 10 to 4, and that the Senate receded completely on this amendment, the House receding on its amendment number 91 with an amendment which fixed the number of individuals at 8.

It is significant to note that the only change made by the Conference Committee was in the number of weeks, which was fixed at 20, and the number of individuals, which was fixed at 8, both purely mathematical changes, which left completely undisturbed the definitions set forth by the House and Senate Committees in their respective reports above quoted.

Obviously, a week to be “in the calendar year” must be *wholly* “in the calendar year.”

In its brief the Government relies upon S. S. T. 414, 1941-1 Cum. Bull. 412, in which it is stated that the term “calendar week” in Section 1607(a) of the Code as amended means a period of 7 successive days beginning with Sunday and ending at the close of the following Saturday. The memorandum ruling in question then states the bare conclusion, without any reasoning whatever, that, “For the purpose of Section 1607(a) of the Code, as amended, a day during a taxable (calendar) year is in a separate ‘calendar week’ even if such calendar week does not fall wholly within the calendar year.”

With the definition of the term “calendar week” in Section 1607(a) of the Internal Revenue Code, as amended—“a period of 7 successive days beginning with Sunday and ending with the close of the following Saturday”—we are in accord.

We do not agree, however, with the further statement in the ruling just quoted that, for the purpose of the said Section, a day during a taxable (calendar) year is in a separate “calendar week” even if such calendar week does not fall wholly within the calendar year. Such a ruling, we are convinced, does violence to the intent of Congress as plainly manifested in the Committee reports, and to the language of the pertinent provisions of Sections 1600 and 1607(a) of the Code, as amended, *supra*.

In a chapter on “Time” in 62 C. J. 960, appear the following:

“SEC. 2.—DEFINITIONS. The nature of time is such that it is capable of division, and of the divisions which have been made, the Courts will take judicial notice.”

“SEC. 9.—CALENDAR YEAR. Ordinarily and in common acceptance 365 days save leap year; from January 1 to December 31, inclusive. * * *.”

The Supreme Court of the United States, in an early decision, *Ronkendorff v. Taylor*, 4 Pet. 361, held that the week commences immediately after 12 o'clock on the night between Saturday and Sunday, and ends at 12 o'clock, 7 days of 24 hours each, thereafter. There was thus established the highest judicial determination of a calendar week.

Even though the ruling, S. S. T. 414, *supra*, is correct in its definition of the term “calendar week,” it by no means follows that it is likewise correct in its assertion that for the purpose of Section 1607(a) of the Code, a day during a taxable (calendar) year is in a separate “calendar week” even if such calendar week does not fall wholly within a calendar year. Such definition utterly ignores the exclusiveness of the language in Section 1607(a) “during the taxable year,” and in the quoted Committee reports “20 weeks [or 13 weeks] *in the year*.” This Court, of course, is not called upon to follow such ruling, which is merely a definition promulgated by one of the divisions of the Bureau of Internal Revenue. On page IV of the Internal Revenue Bulletin No. 17, dated April 28, 1941, in which the ruling S. S. T. 414 appears, the meaning of the abbreviation “S. S. T.” is stated as follows: “Taxes on employment by others than carriers.”

On the same page, the abbreviation “G. C. M.” is explained as “General Counsel’s, Assistant General Counsel’s, or Chief Counsel’s Memorandum.”

Memoranda bearing the symbol “G. C. M.” are published in the Internal Revenue Bulletin as are other rulings

of the Bureau, such as the S. S. T. above referred to, but neither has the force or effect of a Treasury Decision, which is abbreviated as "T. D." A "T. D." is approved and signed by both the Commissioner of Internal Revenue and the Secretary of the Treasury, but minor rulings such as an S. S. T. or a G. C. M., are not. The Courts have ascribed to Treasury Decisions ("T. D's.") the force and effect of law only when they are of long standing as official interpretations by the Treasury Department of the Revenue laws, and have been left unchanged and unaffected by the passage of subsequent Revenue Acts. Consequently, rulings such as an S. S. T. or a G. C. M. do not have the force and effect of law, and in addition thereto S. S. T. 414 was promulgated only on April 28, 1941.

In this connection, it is to be noted that in *W. S. Van Dyke v. Commissioner of Internal Revenue*, 120 F. (2d) 945, this Court, on June 16, 1941, held that the Commissioner was not bound by three General Counsels' Memoranda therein cited, and that the fact the taxpayer relied upon erroneous advice contained in those Memoranda was immaterial, saying:

"It is immaterial, if true, that petitioner relied on the erroneous advice contained in G. C. M. 9938, 9953 and 14198. These memoranda were not, as petitioner supposes, rules or regulations having the force of statutes. They were merely communications from counsel to the Commissioner. The advice they contained was for the Commissioner's, not petitioner's, guidance. If petitioner relied on it, he did so at his peril."

It may be observed that the General Counsel's Memoranda therein referred to were rulings published by the

Bureau of Internal Revenue, just as S. S. T. 414 was published, and that the medium of publication, the Internal Revenue Bulletin, is not merely for the information of the employees of the Bureau of Internal Revenue, but for the tax-paying public and tax practitioners as well, among whom it has a wide circulation.

Attention is further invited to the fact that in the reports of both the House Committee on Ways and Means and the Senate Finance Committee it was stated that the 20 weeks provided for in the law "need not be consecutive." As has been shown above, a calendar week consists of 7 full days, beginning on Sunday morning and ending the following Saturday night, and, in using the term "calendar weeks", Congress must have had in mind full calendar weeks falling wholly within the calendar year, and not partial calendar weeks. Otherwise it would have been impossible to define a measure of time as a "calendar week" in providing that the 20 weeks need not be consecutive. In view of the fact that Congress made no provision for a partial calendar week, we believe it necessarily follows that a calendar week "in the year" means a full and complete calendar week of 7 successive days beginning Sunday and ending the following Saturday, wholly within each separate calendar year.

The fixing of 20 calendar weeks and 8 or more employees by Congress as criteria for the purpose of determining who is an employer within the meaning of the Federal Unemployment Tax Act, was, of course, purely arbitrary. Congress could have fixed either a greater or lesser number of weeks or employees, as such determination is properly within its province. Therefore, if a person has in his employ 8 or more individuals on one day of

each of 19 full calendar weeks in the year, he does not fall within the definition of an employer and is not subject to the Unemployment Tax. Employment in each of 20 calendar weeks in the year is mandatory.

January 1, 1941, which was a holiday and on which day the debtor did not have 8 or more employees engaged in work, fell on Wednesday. Even including that day, however, from January 1 to May 16, 1941, inclusive, the latter being the last day on which the debtor had any employees (and then went out of business) there were only 18 full calendar weeks of 7 successive days each, as the first four days of January did not constitute a calendar week, nor did the 6 day period from Sunday, May 11, to Friday, May 16, the last day on which the debtor had any employees.

On page 8 of the Government's brief it is stated that,

“* * * in the period following midnight, Saturday, May 10, 1941, there was at least one such day not within any of those 18 weeks [referring to 18 full calendar weeks during the period January 1 to May 16, 1941] and the taxpayer apparently does not object to counting that day. * * *”

This statement is obviously incorrect inasmuch as in its brief in the District Court the debtor pointed out, as stated in the preceding paragraph, that “* * * from January 1 to May 16, 1941, inclusive, * * * there were only 18 full calendar weeks of 7 successive days each, as the first 4 days of January did not constitute a calendar week, nor did the 6-day period from Sunday, May 11, to Friday, May 16, the last day on which the debtor had any employees.” Consequently the debtor did

specifically object to counting a day during the 6-day period ending May 16, 1941.

The Government also relies upon the opinion of the District Court of Massachusetts in *Garage Service Corp. v. Hassett*, decided January 12, 1942, not officially reported, but found in paragraph 8974 in C. C. H. Unemployment Insurance Service. In that opinion the Court disagreed with the plaintiff's contention that the calendar week from which a day is taken must fall within the taxable year, saying,

“* * * Such a day, provided it is within the taxable year, may be taken from any calendar week, whether the calendar week is wholly within the calendar year or not, as is the case here of the week in which January 2 fell. * * *”

If that Court is correct in the statement just quoted there is not only a departure from the basic scheme of Federal taxation on an annual basis which is now so firmly established as to require no citations of authority, but it is also a denial of the specific intent of Congress with reference to the Federal Unemployment Tax Act as shown by the references in that Act to wages paid within the calendar year and to the calendar year in the computation of time, and as so plainly expressed in the House and Senate Committee reports, *supra*. Bearing in mind, therefore, the fact which we do not believe can be successfully controverted, that the plan of the Federal Unemployment Tax Act is based entirely upon the calendar year, the error into which we believe the Massachusetts Court fell in the *Garage Service Corporation* case is apparent and can be demonstrated by visualizing the situation which would result from the application of the Court's theory.

For example, in 1940, December 29, 30 and 31 fell respectively on Sunday, Monday and Tuesday, while in 1941, January 1, 2, 3 and 4 fell respectively on Wednesday, Thursday, Friday and Saturday. Consequently there were two normal working days in 1940 and three in 1941 during the 7 day period from Sunday, December 29, 1940, to Saturday, January 4, 1941. Under the theory of the Massachusetts Court, therefore, it would be possible to count one day, either December 30 or 31 in 1940 for the purpose of determining the statutory 20 week period within the calendar year 1940, and at the same time count either January 2, 3 or 4, 1941, for the purpose of determining the 20-week period within the year 1941, thereby using the *same* calendar week of December 29, 1940 to January 4, 1941, *twice*, once in 1940 and again in 1941, for the purpose of determining the taxability of an employer, when such computation is plainly and specifically prohibited by Section 1607(a) itself, which requires that in computing "each of some 20 days during the taxable year" each day must be "in a *different* calendar week." Obviously the same calendar week cannot be used in each of two calendar years for the purpose of finding 20 days in each calendar year in *different* weeks.

The rule for which the Government contends would, by using partial weeks at the beginning and end of each year, result in their being 54 weeks in each year instead of the usual 52; a somewhat startling phenomenon.

In answer to the further contention of the Government on page 9 of its brief, it should be said that appellees have not attacked the *method* of classification in Section 1607(a) of the Code, but are merely attempting to demonstrate that appellant has given a wholly erroneous interpretation

to the language of that section, an interpretation directly contrary to that expressed in precise terms in the reports of the House Ways and Means Committee and the Senate Finance Committee, *supra*, when they said, respectively:

“(a) Employer: The term ‘Employer’ includes only those persons who, in each of at least 20 weeks *in the year* * * *.” and

“(a) Employer: The term ‘Employer’ includes only those persons who, in each of at least 13 weeks *in the year* * * *.”

As previously stated, the number of weeks was finally fixed at 20 by agreement between the two Houses of Congress.

It would seem that the terms “calendar week” and “in the year” are so plain and explicit in their meaning that they should not be misunderstood or misinterpreted. In that connection the rule of *United States v. Merriam*, 263 U. S. 179, 68 L. ed. 240, is pertinent:

“* * * in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer. *Gould v. Gould*, 245 U. S. 151, 153, 62 L. ed. 211, 213, 38 Sup. Ct. Rep. 53. * * *”

In dealing with the question whether a citizen of the United States was “a *bona fide* non-resident of the United States for more than 6 months during the taxable year”

within the meaning of Section 116(a) of the Revenue Act of 1936, which provides in part as follows:

“Sec. 116. EXCLUSIONS FROM GROSS INCOME. In addition to the items specified in Section 22(b), the following items shall not be included in gross income and shall be exempt from taxation under this title:

“(a) Earned Income From Sources Without United States—In the case of an individual citizen of the United States, a *bona fide* nonresident of the United States for more than six months during the taxable year, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof) if such amounts would constitute earned income as defined in section 25(a) if received from sources within the United States; but such individual shall not be allowed as a deduction from his gross income any deductions properly allocable to or chargeable against amounts excluded from gross income under this subsection.”

the Bureau of Internal Revenue has laid down, through G. C. M. 22,065, Cum. Bull. 1940-1, page 100, the opposite of the rule for which it is contending in this case. There, the taxpayer was endeavoring to establish that he was a *bona fide* non-resident of the United States for more than 6 months because of four absences from the United States consisting of two trips to Europe and two trips to Canada. In computing the time from which he was absent from the United States, taxpayer added the hours and minutes of the time so absent and the aggregate time so computed exceeded 6 months by 22 hours and 30 minutes. After announcing that the specific inquiry presented in that case related to the proper basis upon which the 6-month statutory period should be computed, the rul-

ing held that one of the periods of absence, that from October 16 to November 8, "is a fractional part of a calendar month and is not, therefore, to be recognized in computation." Exemption from taxation was therefore denied.

Clearly, the appellant cannot consistently maintain its position in each of two diametrically opposite conclusions.

In one of the cases cited in its brief by the Government, *Carmichael v. Southern Coal Co.*, 301 U. S. 495, the Supreme Court of the United States had before it for decision the question whether the Unemployment Compensation Act of Alabama (one of the group of laws enacted by a number of the states following the lead and the pattern of the Federal Social Security Act which levied a Federal unemployment tax) was constitutional.

In holding the Alabama law valid the Court, speaking through Mr. Justice Stone, pointed out that the said Act

"* * * sets up a comprehensive scheme for providing unemployment benefits for workers employed within the state by employers designated by the Act. These employers include all who employ eight or more persons for twenty or more weeks *in the year*, Sec. 2(f), except those engaged in certain specified employments.

* * * * *

"(a) Exclusion of Employers of Less than Eight. Distinctions in degree, stated in terms of differences in number, have often been the target of attack, see *Booth v. Indiana*, 237 U. S. 391, 397, 59 L. ed. 1011, 1017, 35 S. Ct. 617. It is argued here, and it was ruled by the court below, that there can be no reason for a distinction, for purposes of taxation, between

those who have only seven employees and those who have eight. Yet, this is the type of distinction which the law is often called upon to make. It is only a difference in numbers which marks the moment when day ends and night begins, when the disabilities of infancy terminate and the status of legal competency is assumed. It separates large incomes which are taxed from the smaller ones which are exempt, as it marks here the difference between the proprietors of larger businesses who are taxed and the proprietors of smaller businesses who are not.” (Italics supplied.)

The Court thus lent special emphasis to the fact that the number of employees, the number of days, and the number of weeks specified in such legislation are entirely arbitrary, but by the same token the lines of demarcation so laid down must be strictly observed, no less by the Government than by taxpayers.

The foregoing quotation appears to be a complete answer to the charge of unfair discrimination in the example cited by the Government in the first complete paragraph on page 9 of its brief. Continuing its discussion of the exemption of particular classes of employers, the Court made the following significant pronouncement:

“Similarly, the legislature is free to aid a depressed industry such as shipping. The exemption of business operating for *less than twenty weeks in the year* may rest upon similar reasons, or upon the desire to encourage seasonal or unstable industries.” (Italics supplied.)

The foregoing quotation would seem to be an explicit approval of our contention that the tax in question is levied only upon those employers who, having eight or more

employees, operate for *at least* twenty calendar weeks *in the year*. The context of the quotation clearly shows that the Court must have had in mind twenty full calendar weeks "*in the year*."

Because the California Unemployment Insurance Act is, for the purpose of determining the question at issue in the case at bar, essentially similar to the Federal Unemployment Tax Act, and also because the State of California would be entitled to the major portion of the taxes sought to be collected herein, we believe it will be helpful to quote a portion of the California Act and to cite several rulings thereunder.

Section 9 of the California Act, Chapter 352, Laws of 1935, as amended, provides in part as follows:

"Sec. 9. Employer means:

"(a) Any employing unit, which for some portion of a day, but not necessarily simultaneously, *in each of twenty different weeks*, whether or not such weeks are or were consecutive, *has within the current calendar year* or had within the preceding calendar year in employment four or more individuals, irrespective of whether the same individuals are or were employed in each such day; provided, that prior to January 1, 1938, employer means any employing unit which for some portion of a day, but not necessarily simultaneously, in each of twenty different weeks, whether or not such weeks are or were consecutive, has within the current calendar year or had within the preceding calendar year in employment eight or more individuals, irrespective of whether the same individuals are or were employed in each such day;" (Italics supplied.)

Sections 37 and 38 of the California Act relate to contributions and, so far as pertinent, provide as follows:

“Sec. 37(a) On and after January 1, 1936, contributions to the unemployment fund shall accrue and become payable by every employer *for each calendar year* in which he is subject to this act, with respect to wages paid for employment occurring during the calendar year 1937 and upon wages payable during subsequent calendar years; provided, however, that if and when the taxes payable under Title IX of the Federal Social Security Act (or the corresponding provisions of the Internal Revenue Code, or any other Federal act into which such tax now is or hereafter may be incorporated) become payable on a basis of ‘wages paid’ rather than ‘wages payable’, then as of that time the contributions due hereunder shall thereafter be upon wages paid. Such contributions shall become due and be paid to the commission for the unemployment fund by each employer in accordance with such regulations as the commission may prescribe, and shall not be deducted in whole or in part, from the wages of individuals in his employ.” (Italics supplied.)

“Sec. 38. Every such employer shall pay into the employment fund contributions equal to the following amounts:

* * * * *

“(c) For the year 1938 and thereafter, two and seventy one-hundredths per cent of all wages with respect to which contributions become due and payable for employment subject to this act.”

In the Rules adopted by the State of California for the administration of the State Unemployment Insurance Act,

C. C. H. Unemployment Insurance Service, pp. 8301, *et seq.*, the following definition of “week” is included:

“Rule 12.1. Term ‘Week’ Defined.—The term ‘week’, unless the wording clearly otherwise requires, whenever used in the Act, Rules and Regulation, forms, procedures and instructions thereon and all other official pronouncements of the Department of Employment, shall mean the period of seven consecutive days commencing Sunday and ending Saturday.

“This revised rule shall become effective September 29, 1940, provided that an employing unit shall not become an employer subject to the Act solely by reason of its employment of four or more individuals upon said effective date if such employing unit has not, prior to said effective date, employed four or more persons in each of more than nineteen ‘weeks’. (Adopted November 19, 1937, effective January 1, 1938; revised December 2, 1939, effective December 28, 1939; revised October 18, 1940, effective September 29, 1940.)”

The following are excerpts from Codified Interpretative Opinions under the California Act:

Opinion No. 2009-02, March 10, 1941.

“Section 9(a) of the Act as amended effective August 27, 1939, provides in part that a subject employer (prior to January 1, 1938) was ‘any employing unit which for some portion of a day, but not necessarily simultaneously, in each of twenty different weeks, whether or not such weeks are or were consecutive, has within the current calendar year or had within the preceding calendar year in employment eight or more individuals * * *.’ Since the ‘M’ Company had the requisite employment experience; i. e., eight or more individuals in employment on

some portion of a day *in each of twenty different weeks during the preceding calendar year* (1936) it fell squarely within the provisions of amended Section 9(a) and therefore became subject to the Act on the effective date of the section; i. e., August 27, 1937.” (Italics supplied.)

Opinion No. 5011-01, February 7, 1941.

“*Since the calendar year is the unit or period for the determining of contribution liability*, only the net wages for the year are properly taxable as provided by Section 11(b) and Rule 11.6. To arrive at a net wage for the year all business expenses properly deductible which are incurred during the calendar year may be deducted from the earnings for the entire year. Thus, where business expenses exceed earnings in one calendar quarter these expenses may be carried into a subsequent calendar quarter and deducted from the earnings during that quarter. This procedure may be followed until the expenses are exhausted or *until the final quarter of the year has been reached*, whichever occurs first. The \$50.00 excess in expenses incurred by ‘S’ during the first quarter of the year may be deducted from the \$100.00 in net earnings realized in the second quarter, and the reports filed by ‘M’ Company will show only \$50.00 net earnings for the second quarter.

“Where the final quarter of the calendar year shows an excess of expenses over earnings, *this excess may not be carried into the next calendar year*. However, if net wages have been reported for prior calendar quarters in the same calendar year, an adjustment may be made and a credit granted the employer for an overpayment. In making this adjustment, the expenses should be prorated among the various quarters in which net earnings have been reported.” (Italics supplied.)

These rulings under the California Act, particularly Opinion No. 5011-01, indicate clearly that the State of California has made the calendar year the exclusive unit or period of time for determining the liability of an employer under the State Unemployment Insurance Act, and we think it clear that the same standard of measurement is applicable in the administration of the Federal Unemployment Tax Act. It is believed that under the law and rulings above quoted the debtor is exempt from tax under the California Unemployment Insurance Act.

Summary.

In determining whether the debtor had in its employ 8 or more employees during 20 calendar weeks in the calendar (taxable) year of 1941, prior to its going out of business at the close of business May 16, 1941, we believe the following resumé may be helpful:

(1) Section 1600 of the Internal Revenue Code, as amended, requires every employer, as defined in Section 1607(a), to pay for the calendar year 1939, and "for each calendar year thereafter" an excise tax, with respect to having individuals in his employ, equal to 3% of the total wages "*paid by him during the calendar year*" with respect to employment after December 13, 1938. This language not only makes the taxable year co-existent with the calendar year, but limits the 3% tax on wages to the wages paid by an employer "*during the calendar year*". This definitely negatives the Government's assertion that for the purpose of levying and collecting such

tax the Commissioner is permitted to go back to a preceding calendar (taxable) year and add to a partial calendar week at the beginning of a year several days in the preceding calendar year in order to make up a full calendar week. To be specific, wages paid in 1940 are not taxable under Section 1600 of the Code in 1941 but only in 1940, and that section places the Unemployment Insurance Tax exclusively on a calendar year basis for all purposes.

(2) Both the House Ways and Means Committee and the Senate Finance Committee stressed the fact that the definitions set up by Section 907 of the original Social Security Act, which later became Section 1607(a) of the Internal Revenue Code, "*are very important in connection with the application and scope of the entire title*". (Italics supplied.)

The said reports both then proceeded to define the term "employer" as only those persons who, on one day in each of *at least 20 weeks in the year* have a total of 8 or more employees.

This language is highly significant in its use of the terms "at least" and "20 weeks in the year". Its obvious meaning must be that a person who employs others is not an employer within the meaning of the Section if his employment of such others (8 or more) falls short of 20 complete calendar weeks, and further that such 20 complete weeks must be "*in the year*", meaning the calendar year which is set up as the measure of time in Section 1600 of the Code. Certainly there would be

no fixed or definite measure of a calendar week if Congress had had less than a complete calendar week in mind, particularly in view of the fact that the 20 calendar weeks were not required to be consecutive. Accordingly, nothing less than a full calendar week of 7 successive days beginning on Sunday and ending the following Saturday would be a correct yardstick by which to measure non-consecutive calendar weeks, and we contend the references to “at least 20 weeks *in the year*” definitely confine such 20 weeks within each separate calendar year.

(3) To permit partial calendar weeks at the beginning or end of a calendar year to be counted as statutory calendar weeks would allow the same calendar week to be used twice, once in each of two successive years, and would nullify the specific requirement that each of the 20 days shall be “in a different calendar week”. (Section 1607(a) of the Code.)

(4) The Supreme Court of the United States, in *Carmichael v. Southern Coal Co.*, *supra*, interpreting a State law based upon the Federal Unemployment Tax Act, refers to 20 weeks “in the year”.

For the foregoing reasons, we contend that the debtor in this case did not employ 8 or more persons on at least one day in each of 20 calendar weeks in the year 1941, within the correct interpretation of the language used by Congress in the pertinent sections of the Internal Revenue Code, and that the debtor is therefore not subject to the Federal Unemployment Tax Act.

Conclusion.

The decision of the Federal District Court in this case is correct and should be affirmed.

Respectfully submitted,

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Russell, individually.*

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GRAHAM L. STERLING, JR.,
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Aircraft Corporation.*

APPENDIX.

Statutes and Regulations.

INTERNAL REVENUE CODE.

“SEC. 1600. RATE OF TAX.

Every employer (as defined in section 1607(a)) shall pay for the *calendar* year 1939 and for each *calendar* year thereafter an excise tax, with respect to having individuals in his employ, equal to 3 per centum of the *total wages* (as defined in section 1607(b)) *paid by him during the calendar* year with respect to employment (as defined in section 1607(c)) after December 31, 1938.” (Italics supplied.)

“SEC. 1601. CREDITS AGAINST TAX.

(a) Contribution to State Unemployment Funds.—

“(1) The taxpayer may, to the extent provided in this subsection (c), credit against the tax imposed by section 1600 the amount of contributions paid by him into an unemployment fund maintained during the taxable year under the unemployment compensation law of a State which is certified for the taxable year as provided in section 1603.

“(2) The credit shall be permitted against the tax for the taxable year only for the amount of contributions paid with respect to such taxable year.

“(3) The credit against the tax for any taxable year shall be permitted only for contributions paid on or before the last day upon which the taxpayer is required under section 1604 to file a return for such year; except that credit shall be permitted for contributions paid after such

last day but before July 1 next following such last day, but such credit shall not exceed 90 per centum of the amount which would have been allowable as credit on account of such contributions had they been paid on or before such last day. The preceding provisions of this subdivision shall not apply to the credit against the tax of a taxpayer for any taxable year if such taxpayer's assets, at any time during the period from such last day for filing a return for such year to June 30 next following such last day, both dates inclusive, are in the custody or control of a receiver, trustee, or other fiduciary appointed by, or under the control of, a court of competent jurisdiction.

* * *

“(c) Limit on Total Credits.—The total credits allowed to a taxpayer under this subchapter shall not exceed 90 per centum of the tax against which such credits are allowable.”

“SEC. 1607. DEFINITIONS.

“When used in this subchapter—

“(a) Employer.—The term (‘employer’) does not include any person unless on each of some twenty days during the taxable year, each day being in a different calendar week, the total number of individuals who were employed by him in employment for some portion of the day (whether or not at the same moment of time) was eight or more.”

REGULATIONS.

So far as pertinent, Treasury Regulations 107, Section 403.205, provide as follows:

“Reg. 107, Sec. 403.205. Who are employers.—Every person who employs eight or more employees in employment within the meaning of section 1607(c) and (d) of the Act on a total of 20 or more calendar days *during a calendar year*, each such day being in a *different calendar week*, is with respect to such year an employer subject to the tax.

“The several weeks in each of which occurs a day on which eight or more employees are employed *need not be consecutive weeks*. It is not necessary that the employees so employed be the same individuals; they may be different individuals on each day. Neither is it necessary that the eight or more employees be employed at the same moment of time or for any particular length of time or on any particular basis of compensation. It is sufficient if the total number of employees employed during the 24 hours of a calendar day is eight or more.” (Italics supplied.)

United States
Circuit Court of Appeals
For the Ninth Circuit.

MYRTLE D. A. PECK,

Appellant,

vs.

FRANCES HOWARD and FRED HOWARD,
Appellees.

Transcript of Record

Upon Appeal from the District Court of the
United States for the Southern District
of California, Central Division.

FILED

APR 2 - 1942

PAUL P. O'BRIEN,
CLERK

United States
Circuit Court of Appeals

For the Ninth Circuit.

MYRTLE D. A. PECK,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States for
the Southern District of California, Central
Division.

In Bankruptcy
No. 38,621-M

In the Matter of

FRANCES HOWARD, FRED HOWARD,
husband and wife

Debtors

DEBTOR'S PETITION IN PROCEEDINGS
UNDER SECTION 75 OF THE BANKRUPTCY
ACT.

To the Honorable, Judge of the District
Court of the United States for the Southern
District of California:

The Petition of Frances Howard, and Fred Howard, husband and wife, Residing at No. Lake Hughes, Star Route, County of Los Angeles, State of California, respectfully represents:

That they *is* primarily bona fide personally engaged in producing products of the soil (or that *he* is primarily bona fide personally engaged in dairy farming, the production of poultry or livestock, or the production of poultry products or livestock products in their unmanufactured state, or the principal part of whose income is derived from any one or more of the foregoing operations) as follows:

Raising and production of turkeys, chickens
(1200 head) fruit trees and vegetables for all

family consumption on N. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of
Section 31 Twp. 8 N., Range 16 E. S. B. B. M.

that such operations occur in the county (or counties) of Los Angeles within said judicial district; that *he is* insolvent (or unable to meet *his* debts as they mature); and that *he* desires to effect a composition or extension of time to pay *his* debts under Section 75 of the Bankruptcy Act.

That the schedule hereto annexed, marked "A", and verified by your petitioner's oath, contains a full and true statement of [2] all *his* debts, and (so far as it is possible to ascertain) the names and places of residence of *his* creditors, and such further statements concerning said debts as are required by the provisions of said Act.

That the schedule hereto annexed, marked "B", and verified by your petitioner's oath, contains an accurate inventory of all *his* property, both real and personal, and such further statements concerning said property as are required by the provisions of said Act.

Wherefore your petitioners prays that *his* petition may be approved by the court and proceedings had in accordance with the provisions of said section.

FRED HOWARD

FRANCES HOWARD

Petitioner

PAUL LEITER

PAUL LEITER

Attorney for Petitioner

United States of America,
District of California,
State of California,
County of Los Angeles—ss.

I, Frances Howard and Fred Howard, the petitioning debtors mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of *my* knowledge, information, and belief.

FRED HOWARD
FRANCES HOWARD,
Petitioners

Subscribed and sworn to before me this 24 day of May, A. D. 1941.

[Seal] ELIZABETH N. DUMESNIL
Notary Public in and for the County of Los Angeles, State of California.

(Official Character.) [3]

That the property herein mentioned in the said petition in proceedings under Section 75 of the Bankruptcy Act is the community property of the parties, and this is a petition filed jointly by the parties hereto.

FRED HOWARD
FRANCES HOWARD

United States of America,
District of California,
State of California,
County of Los Angeles—ss.

I Frances Howard and Fred Howard, the petitioning debtors mentioned and described in the foregoing petition do hereby make solemn oath that the statements contained therein are true according to the best of *my* knowledge, information and belief.

FRANCES HOWARD

FRED HOWARD

Subscribed and sworn to before me this 24th day of May, 1941.

[Seal]

WILLIAM M. CURRAN

Notary Public in and for said County and State.

[Endorsed]: Filed May 26, 1941, 10:37 A. M.
38621-M. [4]

[Title of District Court and Cause.]

APPROVAL OF DEBTOR'S PETITION AND
ORDER OF REFERENCE (UNDER SECTION 75 BANKRUPTCY ACT).

At Los Angeles, in said District, on May 26, 1941 before the said Court the petition of Fred Howard and Frances Howard, husband and wife, that they desires to effect a composition or an extension of time to pay their debts, and such other relief as may be allowed under the Act of March 3, 1933, and within the true intent and meaning of all the

Acts of Congress relating to bankruptcy, having been heard and duly considered, the said petition is hereby approved accordingly.

It is thereupon ordered that said matter be referred to Constantine P. Von Herzen, Esq., one of the Conciliation Commissioners in bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and that the said Fred Howard and Frances Howard, husband and wife, shall attend before said Conciliation Commissioner on June 2, 1941 and at such time said Conciliation Commissioner shall designate, at his office in Los Angeles, California, and shall submit to such orders as may be made by said Conciliation Commissioner or by this Court relating to said matter.

Witness, the Honorable Paul J. McCormick, Judge of said Court, and the seal thereof, at Los Angeles, in said District, on May 26, 1941.

[Seal]

R. S. ZIMMERMAN,

Clerk

By E. M. ENSTROM, JR.,

Deputy Clerk

[Endorsed]: Filed May 26, 1941, 4:22 P. M. [5]

[Title of District Court and Cause.]

APPLICATION FOR CONFIRMATION OF
COMPOSITION OR EXTENSION PROPO-
SAL UNDER SECTION 75 BANKRUPTCY
ACT.

To the Honorable Paul J. McCormick, Judge of the
District Court of the United States, Southern
District of California, Central Division:

At Los Angeles, in said district, on the 25th day
of September, 1941, now come the above named
debtors and respectfully represent to the court, that
they filed in the Court a schedule of *the* their prop-
erty and a list of their creditors, as required by law,
on the 26th day of May, 1941, and that thereafter,
to-wit, on the 17th day of July, 1941, at the hour of
10:00 o'clock A. M., in the Courtroom of the Hon-
orable C. Von Herzen, Conciliation Commissioner
of the above entitled court, for Los Angeles County,
a meeting of creditors was had, at which time and
place the debtors were examined by the creditors;

Thereupon, by consent of all the parties present,
in person, and by attorneys, the matter was con-
tinued over for hearing to August 6, 1941, at which
time, such matters were heard and business trans-
acted as to cause the said matter to be continued
for further hearing to August 27, 1941, before the
said Conciliation Commissioner, at which time the
debtors informed the said Conciliation Commis-
sioner that acceptance of the composition or exten-
sion proposal as submitted by the debtors to their

creditors had been accepted in writing by all creditors except the Bank America;

That the written acceptance of the proposal included the *secu* secured creditors whose claims are to be affected by the [6] proposal, as well as the unsecured creditors, and represents a majority in number and amount of creditors consenting, Bank America being the only dissenting creditor.

That attached hereto, and made a part hereof the same as if set out in full herein is "Exhibit A", which consists of all the acceptances in writing by creditors agreeing to the composition proposed by debtors.

That all the creditors who consented, as set out in Exhibit "A" had valid and allowable claims against the said debtors and all of said claims were and are allowed.

That there is no debt allowed by priority by law, except the sum of \$12.90 due the County of Los Angeles for street light assessment, and the sum of \$75.00 due and owing to George Smith as and for rent owing to the landlord.

That all federal and state taxes on real or personal property owned by debtors which would have priority secured by the Act, are paid, and were paid at time of the filing of the petition.

That the following is a list of the secured debts with a description of the security of each:

Dana Weller 704 So. Spring Street. Holding a first trust deed of \$300.00 on Ranch property described in the schedule of debtors on

page (3) schedule A-2 thereof. Amount due claimant is \$100.00. Value of property is \$7500.00.

Security First Nat'l Bank 5th and Spring Branch. The security is a note and trust deed in amount of 6146.49 in favor of said bank, on Apartment house situated at 1008 W. 11 Street, and more particularly described in Schedule A-2, pge (3) of the schedule on file in the above entitled cause. Said property is of the value of \$16,000.00.

That the final inventory, and list of exemptions is more particularly set out in the schedules on file in the above entitled cause, reference to which is hereby made, and by such [7] reference made a part hereof the same as if set out in full herein.

Wherefore, debtors pray the said proposal be confirmed by the Court.

Dated: Oct. 15, 1951.

FRANCES HOWARD

.....
Debtors.

[Endorsed]: Filed Nov. 6, 1941. [8]

CERTIFICATE OF CONCILIATION
COMMISSIONER

Undersigned, U. S. District Court Conciliation Commissioner does hereby certify that the first

meeting was held before me; that thereafter continuances as set out in the application for confirmation of composition were had, and finally an offer of composition or extension proposal was duly submitted in time by the debtors, and that the same was duly accepted by a majority in amount and number of creditors, said creditors expressing their acceptance in writing. That in the opinion of the undersigned, the composition is fair and reasonable and is an equitable and feasible method of liquidation for secured creditors whose claims are affected and of financial rehabilitation for the debtor; that it is for the best interests of all creditors, and that the offer and acceptance are in good faith, and is fair and reasonable and approve the said application.

That a question as to whether or not a particular water right should be determined in the State Court, or lawsuit be held in abeyance under and pursuant to section 75 of the Bankruptcy Act has come up, and for that reason it is advisable that the Conciliation Commissioner and the above entitled court retain jurisdiction of the farmers and debtors, and their property.

Dated this 22nd day of October, 1941.

C. P. VON HERZEN

U. S. District Court Conciliation
Commissioner, Los Angeles County

[Endorsed]: Filed Nov. 6, 1941. [9]

[Title of District Court and Cause.]

NOTICE OF HEARING ON MOTION
FOR ORDER

To the Creditors in the Above Entitled Cause and
to Their Respective Attorneys:

You and each of you will please take notice that a motion will be made for an order confirming a composition or extension proposal under Section 75 of the Bankruptcy Act in the above entitled cause on Monday, the 24th day of November, 1941 at the hour of 10 o'clock A. M., or as soon thereafter as counsel can be heard, in Courtroom No. 8, Federal Building, corner of Main and Temple Streets, in the City of Los Angeles, State of California, before the Hon. Paul J. McCormick, Judge presiding.

Said motion will be made on the grounds that all of the creditors being a majority in number and amounts have filed written acceptances of the composition or extension proposal and are willing for the Court to approve the said composition offer and will be based on this notice of motion on the petition of said debtors for an order confirming composition or extension proposal and upon all of the records, files or pleadings in the above entitled cause.

Dated: November 5, 1941.

PAUL LEITER

Attorney for Debtors

[Endorsed]: Filed Nov. 6, 1941, 9:50 A. M. [10]

[Title of District Court and Cause.]

PETITION OF MYRTLE D. A. PECK FOR
LEAVE TO PROCEED WITH THE TRIAL
AND DETERMINATION OF AN ACTION
PENDING BEFORE THE SUPERIOR
COURT OF LOS ANGELES COUNTY,
STATE OF CALIFORNIA.

To The Honorable Paul J. McCormick, Judge of
said District Court:

Comes Now the Petitioner, Myrtle D. A. Peck,
and presents to the Court:

I.

That the petitioner is now and for many years last past has been the owner of and in possession of that certain ranch property situate in the west end of Antelope Valley, Los Angeles County, State of California, consisting of about 1250 acres of land and consisting, in part, of Section 16 in Twp. 8 North, Range 16 West, S. B. M., except for a strip of land 100 feet wide in the westerly portion of said section, owned by the City of Los Angeles and occupied by the pipe-line of the Owens River Aqueduct.

II.

That in addition to the above-described real property, petitioner is also the owner and in possession of a certain pipe-line, right-of-way for the same, and the water flowing therethrough, running from the above-described real property into the hills in

a southerly direction a distance of about five miles, where said pipe-line gathers and takes into its flow the waters [11] of three certain springs; that the petitioner and her predecessors in interest have owned and maintained said pipeline and right-of-way for a period of more than forty years last past, and have continuously maintained said pipeline as a means of conveying the waters from three certain springs at the head of said pipeline, and have continuously used and appropriated all of the water flowing from said springs; that said appropriation of water was made by the predecessors in interest of petitioner herein, in 1894, when the land whereon said three springs are located was public land unappropriated and belonging to the United States Government; that the appropriator of the waters of said three springs also constructed a pipeline to take the waters arising from said three springs and conduct the same to the above-mentioned Section 16, then owned by said appropriator and one of the predecessors of petitioner; that said pipeline was completed about July 1, 1895, and that ever since the completion thereof petitioner and her predecessors in interest have owned, been in the possession thereof, and used said pipeline to convey water from the above-mentioned springs to the said Section 16 for domestic and agricultural uses.

That at the date of the construction of said pipeline across the land of the debtors herein, Frances Howard and Frederick Howard, her hus-

band, and at the date of the completion of said pipeline on July 1, 1895, the forty (40) acres now owned by said debtors was public, unappropriated land belonging to the United States Government; and that, by reason of the construction of said pipeline at said time, the aforementioned predecessor of petitioner, one Henry Hatch, acquired from the United States Government a vested right-of-way for said pipeline over and across the forty acres of land now owned by said debtors.

III.

That the debtors herein, to-wit, Frances Howard and Frederick Howard, her husband, are the owners and in possession of the NE $\frac{1}{4}$ [12] of the SE $\frac{1}{4}$ of Section 31, Twp. 8 North, Range 16 West, S. B. M., in the County of Los Angeles, State of California, and that this is the forty acres of land hereinabove referred to as being public and unappropriated land when the pipeline was constructed and completed across the same on or about July 1, 1895; and that it was not until late in December 1895, or in January 1896, that the predecessor in ownership and interest of said debtors in said forty acres settled thereon, and that patent and title to said land was not passed to the said predecessor in interest of said debtors until about September 3, 1904, which said patent contained a specific exemption in favor of any rights established for ditches, carrying water, and appropriations made while the same was Government land.

IV.

That the aforesaid debtors acquired the above mentioned forty acres of land now owned by them, in January 1939, and soon thereafter commenced to trespass upon the right-of-way wherein said pipeline was located, upon said pipeline, and to appropriate and use water flowing therethrough for irrigation purposes, domestic uses, irrigation of trees, both fruit and ornamental, watering of a large lawn at a house built and established thereon by said debtors, and for use in the establishment and carrying on of a poultry and turkey business established by debtors on said forty acres, and did use said water in an extravagant and wasteful manner. That such use was in violation of the ownership and rights of petitioner and without any right whatsoever in said debtors to so use the water belonging to petitioner and flowing through said pipeline.

V.

That in 1939, petitioner made many objections and protests to said debtors against the use of water flowing through said pipeline, and although the said debtors promised and agreed from time to time to desist therefrom, they did not do so; and that [13] on the 1st day of October, 1940, petitioner commenced an action in the Superior Court of the State of California in and for the County of Los Angeles, numbered 456533, seeking to enjoin the said Frances Howard and Frederick Howard, her husband, debtors herein, from the above men-

tioned continuous trespass upon petitioner's property and appropriation and use of water flowing through said pipeline belonging to petitioner, and for damages and costs; and that a preliminary injunction was granted on November 1, 1940, restraining and enjoining the defendants in said action, to-wit, the debtors herein, from the further or any use of the waters belonging to petitioner and flowing through said pipeline, except for household use and a reasonable amount to sprinkle the lawn then established at the house belonging to said defendants in said action; said restraining order to be in force pending the trial of said action.

That thereafter said action was set for trial for March 5, 1941, and was tried for about five days, and was nearing completion of trial, when the attorney-at-law acting as a judge pro tem, declined to proceed further with the case on the ground that he could not give further time from his private practice to the hearing of said action. That said case by agreement was reset for May 12, 1941, and the trial proceeded before Department 20 of said Superior Court for four days, and was nearing completion when a stipulation was made in open court on May 15, 1941, for judgment in favor of petitioner, the plaintiff in said action, and against said defendants, for a permanent injunction, damages and costs, but allowing defendants a stipulated amount of water for household use only, and said matter was continued to May 26, 1941, to allow time for preparation and presentation of a decree based on said stipulation.

That these debtors, Frances Howard and Frederick Howard, her husband, thereafter and shortly prior to May 26, 1941, disavowed said stipulation made in open court as aforesaid, and refused to [14] permit petitioner's attorney to approve any form of decree based thereon; and that said cause came on for further hearing on May 26, 1941, at which time one Paul Leiter, the attorney for the debtors herein, was associated as an attorney for defendants in said action, and announced that he had that morning filed a petition in bankruptcy under Section 75 of the Bankruptcy Act, and then moved that said cause go off the calendar and no further proceedings be had therein. That the trial judge in Department 20 of said Superior Court declined to grant said motion but continued the further hearing of said action to June 20, 1941, and thereafter, on agreement of attorneys representing plaintiff and defendants, further continued the trial of said action to September 25, 1941, and on further stipulation of attorneys for the parties to said action the same was continued to November 25, 1941, where it is now set for hearing in Department 20 of said Superior Court.

VI.

That the first meeting of the creditors of the debtors in the above-entitled matter was held before the Conciliation Commissioner designated by this Court, on July 17, 1941; that the attorney for petitioner endeavored from time to time, in August and September and in the fore part of October, to

have the report of the conciliation commissioner filed herein, in order that petitioner might proceed under subsection “(o)” of said Sec. 75 of the Bankruptcy Act for leave to proceed with the trial of her action in the State court; that the report of the conciliation commissioner was filed in this Court on November 6, 1941, and the certificate of the commissioner is dated October 22, 1941, and that said report of conciliation commissioner has been set before this Court for hearing for confirmation, for November 24, 1941, at 10:00 o’clock A. M.

Wherefore, Petitioner prays that an Order and citation be issued herein against the debtors, Frances Howard and Frederick [15] Howard, her husband, and Paul Leiter, their attorney, to be and appear before this Court at its courtroom in the Federal Building in Los Angeles, California, on Monday, the 24th day of November, 1941, at 10:00 o’clock A. M., or as soon thereafter as counsel can be heard, to show cause, if any they have, why an Order should not be made herein granting leave to petitioner, Myrtle D. A. Peck, to proceed with the action now pending and partly heard, before said Superior Court of Los Angeles County, State of California, wherein petitioner is plaintiff and these debtors are defendants, No. 456533,—and for such other and further orders as the petitioner may be entitled to in the premises.

MYRTLE D. A. PECK

Petitioner

JAMES P. CLARK

Attorney for Petitioner

State of California,
County of Los Angeles—ss.

Myrtle D. A. Peck, being by me first duly sworn, deposes and says: That she is the Petitioner in the foregoing and above entitled action; that she has read the foregoing Petition and knows the contents thereof; and that the same is true of her own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters that she believes it to be true.

MYRTLE D. A. PECK

Subscribed and sworn to before me this 15 day of November, 1941.

[Notarial Seal]

J. H. GOSLING

Notary Public in and for said County and State.

My Commission Expires Sept. 11, 1945.

[Endorsed]: Filed Nov. 17, 1941, 10:54 A. M. [16]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

The Petition of Myrtle D. A. Peck having been filed herein, praying leave to proceed with the trial of a certain action now partly tried and pending in the Superior Court of the State of California in and for the County of Los Angeles, No. 456533, wherein petitioner is plaintiff and these debtors, Frances Howard and Frederick Howard, her husband, are defendants, and good cause appearing therefor,—

It Is Ordered, that Frances Howard and Frederick Howard, the debtors herein, and their attorney, Paul Leiter, be and appear in the courtroom of Paul J. McCormick, Judge of said District Court, in the Federal Building in the City of Los Angeles, State of California, on Monday, the 24th day of November, 1941, at the hour of 10:00 o'clock A. M., or as soon thereafter as counsel can be heard, and then and there show cause, if any, why the petition of Myrtle D. A. Peck for leave to proceed with the trial of the above-mentioned action in the Superior Court of the State of California in and for the County of Los Angeles, should not be granted.

It Is Further Ordered, That service of this Order, accompanied by copy of petition, may be made on debtors and their [17] attorney not less than three days prior to the date of the hearing herein fixed, and time is shortened accordingly.

Dated, this 17 day of November, 1941.

H. A. HOLLZER

Judge

[Endorsed]: Filed Nov. 17, 1941, 9:54 A. M. [18]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE OF ORDER TO
SHOW CAUSE, AND PETITION FOR
LEAVE TO PROCEED WITH ACTION IN
STATE COURT.

State of California,
County of Los Angeles—ss.

P. B. Neal, being sworn says: That affiant is a citizen of the United States, and a resident of the County of Los Angeles, in the State of California, that affiant is over the age of eighteen years and is not a party to the above entitled action that affiant's residence address is 1002 North Avenue 49, Los Angeles, California; that on the 18th day of November, 1941, affiant personally served Paul Leiter, the attorney for the above named debtors, with order to show cause, requiring the debtors above named and Paul Leiter, their attorney, to be and appear in the Court room of Hon. Paul J. McCormick, Judge of said United States District Court, in the Federal Building, in Los Angeles, California on the 24th day of November, 1941, at 10 o'clock A. M. of said day, and to show cause why the petition of Myrtle D. A. Peck for leave to proceed with the trial of a certain action pending in the Superior Court of Los Angeles County, should not be granted, by delivering to and leaving with the said Paul Leiter personally [19] in the City of Los Angeles, County of Los Angeles, California, at his office 1101 Black Building, a copy of said Order to Show Cause, attached to a

copy of the Petition referred to in said Order to Show cause;

And that affiant on the 17th day of November, 1941, served the above mentioned Order to Show Cause, and Petition therein mentioned, on the above debtors, to wit, Frances Howard and Frederick Howard, by placing a true copy of said Order to Show Cause, to which was attached a true copy of the Petition therein referred to in an envelope addressed to said debtors at their residence address, as follows:

“Frances Howard and Frederick Howard
Lake Hughes, Los Angeles County
California”

and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office, at Los Angeles, California, where is located the office of the attorney for the person by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed or there is regular communication by mail between the place of mailing and the place so addressed.

P. B. NEAL

Subscribed and sworn to before me this 19th day of November, 1941.

[Seal]

J. H. GOSLING

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Nov. 19, 1941, 2:50 P. M. [20]

[Title of District Court and Cause.]

AFFIDAVIT OF PAUL LEITER

State of California,

County of Los Angeles—ss.

Paul Leiter, being first duly sworn, deposes and says: That he is attorney for debtors in above entitled action; that on the 17 day of July, 1941, first meeting of creditors was held, and debtors examined; that said matter was thereafter continued from time to time, the last hearing being on August 27, 1941, which continuances were had for the purpose of attempting to secure a majority in number and amount of creditors to accept a composition. That on the last named date, debtors were finally able to secure the consent of the majority in number and amount to a composition.

That debtors did file application for confirmation of Composition, on or about November 9, 1941, after having secured consent of all creditors except Bank America; that affiant was under the impression that the application for composition confirmation should be filed within 3 months. That affiant glanced at rule 50 of the Supreme court, and discovered his error, in that the rule of court provided for application to be made for confirmation, within 3 months after first meeting of creditors. That if the above entitled court does not make an order permitting the general order rule 50 to be waived, debtors, through no fault of their own, will be

jeopardised, and the interests of justice will have been defeated.

This affidavit is made in pursuance to sec. 203 (of the Bankruptcy act) 11 U. S. C. A. subsection (b) thereof, permitting the court in the interest of justice and for good cause shown, to [21] waive the requirement of said general order 50, and to make an order permitting said debtors the right to have said application for confirmation heard on the 24th day of November, 1941 at the hour of 10 o'clock A. M., or as soon thereafter as counsel may be heard, and that the filing of the application for confirmation of composition or extension proposal, on or about November 9, 1941, be deemed to have been filed within the time allowed by law, by reason of said waiver of general order 50 of the Supreme Court of the United States.

PAUL LEITER

Affiant

Subscribed and sworn to before me this 18th day of November, 1941.

[Seal]

MAYNARD J. GIVENS

Notary Public in and for said County and State.

[Endorsed]: Filed Nov. 18, 1941, 10:51 A. M. [22]

[Title of District Court and Cause.]

ORDER WAIVING REQUIREMENT OF GENERAL ORDER 50: PERMITTING FILING OF APPLICATION FOR CONFIRMATION.

Upon reading the affidavit of Paul Leiter, and good cause appearing therefor,

It Is Hereby Ordered, Adjudged and Decreed, that the requirement of General Order 50, of the Supreme Court, that an application for confirmation of composition proposal, be filed by debtors in the above entitled action, within 3 months after first meeting of creditors, be waived, and the debtors in the above entitled cause be deemed to have filed their application for confirmation of composition proposal in time, by having filed said application on November 9, 1941, or thereabouts, and that the hearing on said application for approval of composition, now set in the above entitled court for the 24th of November, 1941, be deemed to be and is hereby ordered to come on for hearing on said date in the same manner, and with the same force and effect as if set down for hearing within time allowed by law, and in conformity with General order 50 of the Supreme Court.

Dated November 18, 1941.

H. A. HOLLZER

Judge, of U. S. District Court
Calif. Central Division

[Endorsed]: Filed Nov. 18, 1941, 9:54 A. M. [23]

At a stated term, to wit: The September Term, A. D. 1941, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 24th day of November in the year of our Lord one thousand nine hundred and forty-one.

Present:

The Honorable Paul J. McCormick, District Judge.

[Title of Cause.]

This matter coming on for hearing on (1) motion for order confirming composition, pursuant to notice, filed November 6, 1941, and (2) petition of Myrtle D. A. Peck for leave to proceed with trial of a certain action pending before the Superior Court of Los Angeles County, etc., pursuant to order to show cause, filed November 17, 1941; Paul Leiter, Esq., appearing as counsel for the debtors; James P. Clark, Esq., appearing as counsel for Myrtle D. A. Peck:

Attorney Leiter makes a statement in support of (1) motion for order confirming composition, pursuant to notice, filed November 6, 1941; Attorney Clark makes a statement in support of (2) petition of Myrtle D. A. Peck, etc.; and Attorney Leiter makes a statement in reply to Attorney Clark.

It is ordered that the petitioner, Myrtle D. A. Peck, be restrained from proceeding further in the

State Court, and that the composition herein be approved and confirmed, without prejudice to the assertion of the rights set forth in the Petition of said Myrtle D. A. Peck and said petition is referred to the Conciliation Commissioner herein, with plenary power, with authority to proceed to hear and determine the issues that are presented by said Petition, subject to the review by proper proceeding by the Judge of this Court. Exception allowed to Petitioner Myrtle D. A. Peck. Counsel for debtors to prepare order thereon. [24]

[Title of District Court and Cause.]

(PROPOSED) ORDER DENYING PETITION
OF MYRTLE D. A. PECK FOR LEAVE TO
PROCEED WITH TRIAL IN STATE
COURT, AND CONFIRMING DEBTORS'
COMPOSITION AND REFERRING MYR-
TLE D. A. PECK'S PETITION TO CON-
CILIATION COMMISSIONER.

The petition of Frances Howard and Frederick Howard for an order, confirming composition offer and extension proposal having come on for hearing before the above entitled Court, on the 24th of November, 1941, and the petition of Myrtle D. A. Peck for leave to proceed with the trial and determination of the Superior Court of the State of California, in and for the County of Los Angeles action, pend-

ing before the Superior Court of the State of California, in and for the County of Los Angeles, being Superior Court case No. 456-533, having come on for hearing before the above entitled Court, on the 24th of November, 1941, said petitioners, Frances Howard and Frederick Howard, being represented by their attorney, Paul Leiter, Esq., and the petitioner Myrtle D. A. Peck, being represented by her attorney, James P. Clark, Esq., and the Court having considered the said petition for confirmation of composition or extension proposal of the debtors and having also considered the petition of Myrtle D. A. Peck for leave to proceed with the trial and determination of the Superior Court of the State of California, in and for the County of Los Angeles, action No. 456533, wherein Myrtle D. A. Peck is plaintiff and Frances Howard and Frederick Howard are defendants, and the evidence upon which said petitions and each of them were based,

Now Therefore, It Is Hereby Ordered, Adjudged and Decreed:

That the prayer of the petition of Myrtle D. A. Peck for leave to proceed with the trial and determination of an action pending before the Superior Court of the State of California, of Los Angeles County, be, and the same is hereby denied.

It Is Further Ordered, Adjudged and Decreed, that the petition of Myrtle D. A. Peck, to proceed to determine and hear that certain action in the Superior Court of the State of California, in and for the County of Los Angeles, being case No.

456533, be, and the same is hereby denied, and the petitioner, Myrtle D. A. Peck be and she is hereby restrained from proceeding further in the State Court and that the composition proposed by debtors be, and the same is hereby approved and confirmed, without prejudice to the assertion of the right to set forth in the petition of Myrtle D. A. Peck, the issues raised therein, and said petition is referred to Conciliation Commissioner herein, with plenary power and authority to proceed to hear and determine issues presented by said petition, subject to review by proper proceedings by the judge of this court.

Exception Allowed to Petitioner, Myrtle D. A. Peck.

Dated December 10, 1941.

.....
United States District Court Judge

Approved as to form, as provided in rule 44:

PAUL LEITER

Attorney for Debtors

Not approved; see objections.

JAMES P. CLARK

Attorney for Myrtle D. A. Peck.

[Endorsed]: Lodged Dec. 10, 1941. [26]

[Title of District Court and Cause.]

OBJECTIONS TO PROPOSED ORDER ON
PETITION FOR LEAVE TO HEAR CAUSE
IN STATE COURT.

Petitioner objects to proposed Order on the following grounds:

(1) That the proposed Order contains a statement that the petition was denied, and this does not conform to the decision made at the hearing, in that the Court stated at the time that the petition was not denied.

(2) That the proposed Order is uncertain, in that it cannot be determined therefrom whether the petition is referred to the Conciliation Commissioner for hearing and report as to whether said petition shall be granted or denied, or whether the reference of the matter to the Conciliation Commissioner is for the purpose of hearing and determining the controversy on the merits involved in the case of Myrtle D. A. Peck, No. 456-533, vs. Debtors, now pending in the Superior Court of Los Angeles County.

JAMES P. CLARK

Attorney for Petitioner

[Endorsed]: Filed Dec. 10, 1941, 10 A. M. [28]

United States District Court, Southern District
of California, Central Division

No. 38621-M. Bankruptcy

In the Matter of

FRED HOWARD and FRANCES HOWARD,
husband and wife,

Debtors.

ORDER DENYING PETITION OF MYRTLE
D. A. PECK FOR LEAVE TO PROCEED
WITH TRIAL IN STATE COURT, AND
CONFIRMING DEBTORS' COMPOSITION
AND REFERRING MYRTLE D. A. PECK'S
PETITION TO CONCILIATION COMMIS-
SIONER.

The petition of Fred Howard and Frances Howard, husband and wife, for an order confirming composition offer and extension proposal having come on for hearing before the above entitled court on the 24th day of November, 1941; and the petition of Myrtle D. A. Peck for leave to proceed with the trial and determination of an action in the Superior Court of the State of California in and for the County of Los Angeles, said action being Superior Court Case Number 456,533, also having come on for hearing before the above entitled court on said 24th day of November, 1941, said petitioners Fred Howard and Frances Howard being represented by their attorney, Paul Leiter, Esq., and the petitioner Myrtle D. A. Peck being repre-

sented by her attorney, James P. Clark, Esq., and the court having considered the said petition for confirmation of composition or extension proposal of the debtors and having also considered the petition of Myrtle D. A. Peck for leave to proceed with the trial and determination of the action No. 456,533 in the Superior Court of the State of California in and for the County of Los Angeles, wherein Myrtle D. A. Peck is plaintiff and Frederick Howard and Frances Howard are defendants, and [29] the evidence upon which said petitions and each of them were based;

Now, therefore, It Is Hereby Ordered, Adjudged and Decreed that the petitioner Myrtle D. A. Peck be restrained from proceeding further in the state court, and that the composition herein be approved and confirmed, without prejudice to the assertion of the rights set forth in the petition of said Myrtle D. A. Peck, and said petition is referred to the conciliation commissioner herein, with plenary power and with authority to proceed to hear and determine the issues that are presented by said petition, subject to the review by proper proceeding by the Judge of this Court. Exceptions allowed to petitioner Myrtle D. A. Peck.

Dated December 10, 1941.

PAUL J. McCORMICK

United States District Judge.

[Endorsed]: Filed Dec. 10, 1941, 11 A. M. [30]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT
COURT OF APPEALS

Notice is hereby given that Myrtle D. A. Peck, petitioner, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from all that part and portion of a certain order and judgment, made and filed in the above entitled matter, on the 10th day of December, 1941, in the above entitled Court, denying the petition of said petitioner for leave to proceed with the trial and determination of a certain action pending in the Superior Court of the State of California, in and for the County of Los Angeles, wherein petitioner is plaintiff and the above named debtors, Frances Howard and Frederick Howard, are defendants, No. 456,533, restraining petitioner from proceeding further in said action, and referring said petition "to the Conciliation Commissioner herein, with plenary power and authority to proceed to hear and determine the issues that are presented by said petition".

Dated January 8th, 1942.

JAMES P. CLARK

Attorney for Appellant
704-706 Grant Building
355 South Broadway
Los Angeles, California.

Copies mailed to Atty. for Debtors & to Conciliation Comr.

E. L. S.

[Endorsed]: Filed Jan. 8, 1942, 12:47 P. M. [31]

[Title of District Court and Cause.]

UNDERTAKING FOR COSTS
ON APPEAL

Know All Men by These Presents :

That the United States Fidelity and Guaranty Company of Maryland, a corporation organized and existing under the laws of the State of Maryland, and duly licensed to transact business in the State of California, is held and firmly bound unto Frances Howard and Frederick Howard, debtors in the above entitled matter, in the plenary sum of Two Hundred Fifty (\$250.00) Dollars, to be paid said debtors, their heirs and assigns; for which payment, well and truly to be made, the United States Fidelity and Guaranty Company, a corporation, binds itself, its successors and assigns, firmly by these presents.

The condition of the above obligation is such that, whereas Myrtle D. A. Peck, the petitioner in said matter, is about to take an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from a certain part and portion of an order and judgment made and filed on the 10th day of December, 1941, denying the petition of said petitioner for leave to proceed with the trial and determination of a certain action pending in the Superior Court of the State of California in and for the County of Los Angeles, wherein petitioner and appellant is plaintiff and the above-named debtors, Frances Howard and Frederick Howard, are

defendants, No. 456533, restraining petitioner from proceeding further in the State court [32] in said action, and referring said petitioner "to the Conciliation Commissioner herein, with plenary power and authority to proceed to hear and determine the issues that are presented by said petition," and which said order and judgment was made by the United States District Court, Southern District of California, Central Division, in the above entitled matter:

Now Therefore, If the appellant shall prosecute said appeal to effect and answer all costs which may be adjudged against her if the appeal is dismissed or the judgment affirmed, or such costs as the appellate court may award if the order and judgment is modified, then this obligation shall be void; otherwise, to remain in full force and effect.

It Is Hereby Agreed by the surety that in the case of default or contumacy on the part of the principal or surety, the Court may, upon notice of not less than ten days, proceed summarily and render judgment against them, or either of them, in accordance with their obligation and award execution thereon.

Signed and Sealed, and dated this 8th day of January, 1942.

UNITED STATES FIDELITY AND
GUARANTY COMPANY

By O. D. BRICK

Attorney-in-Fact

Examined and recommended for approval, as
Provided by Rule 13.

JAMES P. CLARK

Attorney for Appellant [33]

State of California,
County of Los Angeles—ss.

On this 8th day of January in the year one thousand nine hundred and forty-two, before me, Agnes L. Whyte a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared O. D. Brick, known to me to be the duly authorized Attorney-in-fact of the United States Fidelity and Guaranty Company, and the same person whose name is subscribed to the within instrument as the Attorney-in-fact of said Company and the said O. D. Brick duly acknowledged to me that he subscribed the name of the United States Fidelity and Guaranty Company thereto as Surety and his own name as Attorney-in-fact.

In Witness Whereof, I have hereunto^a set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal]

AGNES L. WHYTE

Notary Public in and for Los Angeles County, State
of California.

My Commission Expires Feb. 26, 1945.

Approved Jan. 8, '42.

PAUL J. McCORMICK Judge

[Endorsed]: Filed Jan. 8, 1942, 3:22 P. M. [34]

[Title of District Court and Cause.]

DESIGNATION BY APPELLANT OF POINTS
ON WHICH SHE INTENDS TO RELY ON
APPEAL.

Myrtle D. A. Peck, Appellant, under the appropriate rule governing procedure on appeal, makes this statement and designation of the points on which appellant intends to rely on this appeal from the judgment and order of the above entitled United States District Court, made and filed herein December 10, 1941, as follows, to-wit:

(1) That the action pending in the Superior Court of the State of California in and for the County of Los Angeles, No. 456533, in which petitioner and appellant is plaintiff and the Debtors, Frances Howard and Frederick Howard, are defendants, was commenced October 1, 1940, and more than four months prior to the filing by Debtors of their petition herein, which was filed May 26, 1941.

(2) That said action was one to restrain the defendants therein from the commission of a continuous trespass upon a certain right-of-way and pipeline carrying water, then in the possession of appellant and belonging to appellant; quieting appellant's title to said [35] right-of-way and pipeline, and for damages and costs.

(3) That on November 1, 1940, and after hearing, the said Superior Court in said action granted a preliminary injunction against defendants in said action, restraining them from the use of water from

appellant's pipeline for any purpose whatever except for household use and sprinkling of a lawn about the defendants' house, and this pending the hearing of the action.

(4) That, as set forth in the petition of appellant for leave to proceed with said action, the same has been partly tried on two occasions and this appellant put to great expense in the trial of said action.

(5) That this appellant has had for many years past, and now has, actual possession of the right-of-way crossing debtors' land and the pipeline lying therein, and that the same has belonged to appellant and her predecessors in interest for more than forty years last past.

(6) That the right-of-way, pipeline, and the water flowing therethrough, were the sole property of appellant and formed no part of the estate of these debtors.

(7) That inasmuch as said action in the State court, set forth in the petition, was to restrain debtors from committing trespass, it was error on the part of the above entitled District Court to restrain appellant from proceeding with said action.

(8) That in an action pending in a State court to restrain a person from committing trespass, and such person afterward becomes a bankrupt, it is error for the bankruptcy court to issue a restraining order staying such proceedings in the State court.

(9) That appellant has already incurred very large expenditure of money in seeking to protect her property and rights from invasion and trespass at the hands of these debtors now in bankruptcy, and she should be permitted to proceed and have said action before the State court concluded.

(10) That under subdivision "o" of Sec. 75 of the Bankruptcy Act, [36] the United States District Court had jurisdiction to hear and determine appellant's petition for leave to proceed in the State court, inasmuch as the Conciliation Commissioner's report had theretofore and on November 6, 1941, been filed in said District Court and was before the Court for confirmation.

(11) That under said subdivision "o" of Sec. 75 of the Bankruptcy Act, it was not a condition precedent that the Court should have before it a hearing and report on the petition for leave to proceed in the State court.

(12) That it was an abuse of discretion, under the circumstances disclosed by appellant's petition, to refuse leave to proceed in the State court with the action in said petition referred to, which had already been tried twice and was ready for a speedy determination,—but for the intervention of Debtors' petition in bankruptcy.

(13) That the Order herein appealed from was erroneous in denying appellant's petition.

(14) That that portion of said Order from which this appeal is taken, referring appellant's petition

“to the Conciliation Commissioner herein, with plenary power and with authority to proceed to hear and determine the issues that are presented by said petition,” is in effect a reference to the Commissioner to proceed and hear in a summary manner the question of title to real property claimed by a third person and one outside of the bankruptcy proceeding.

(15) That the Bankruptcy Court does not have summary jurisdiction without the consent of the adverse party claimant, to hear and determine the property rights of said third person who is in the actual or even constructive possession of property claimed by such third person.

(16) That under the circumstances disclosed in appellant’s petition, any claim to the property made by the debtors or the commissioner in bankruptcy must be tried in a court of competent jurisdiction, either State or Federal, and could not be heard and deter- [37] mined in a summary proceeding by this Conciliation Commissioner.

(17) That, whatever the debts or necessities of debtors’ creditors, the property of this appellant could not be appropriated to satisfy the same, or made a part of the bankrupts’ estate.

Dated, this 17th day of January, 1942.

JAMES P. CLARK

James P. Clark, Attorney for Appellant.

704-5 Grant Building

335 South Broadway

Los Angeles, California (MU-8480)

Received copy of the within designation of points
this 17th day of January, 1942.

PAUL LEITER

Attorney for debtors.

Received copy of the within designation of points
this 17th day of January, 1942.

C. P. VON HERZEN

Conciliation Commissioner.

[Endorsed]: Filed Jan. 17, 1942. [38]

[Title of District Court and Cause.]

DESIGNATION BY APPELLANT OF PAPERS
AND MATTERS TO BE INCLUDED IN
THE RECORD ON APPEAL.

Myrtle D. A. Peck, Appellant, under the appropriate rule governing procedure on appeal, hereby designates the portion of the record, proceedings and evidence to be contained in the record of her appeal herein, and which are necessary for the consideration thereof, to-wit:

(1) Petition of the Debtors, filed herein May 26, 1941, and not including schedules.

(2) Approval of Debtors' petition filed herein May 26, 1941.

(3) Application for confirmation, dated October 15, 1951 (1941).

(4) Commissioner's certificate dated October 22, 1941, filed herein November 6, 1941.

(5) Notice of hearing of application for composition and extensions, filed November 6, 1941.

(6) Petition of Myrtle D. A. Peck for leave to proceed in action pending in Superior Court of the State of California in and for the [39] County of Los Angeles, filed herein November 17, 1941.

(7) Order to show cause as against debtors Frances Howard and Frederick Howard, filed November 17, 1941.

(8) Affidavit of service of order to show cause, filed herein November 19, 1941.

(9) Affidavit of Paul Leiter for Order releasing debtors from default in failure to proceed under Rule 50, and Order, filed herein November 18, 1941.

(10) Minute order dated *October 24, 1941*.

(11) Proposed order prepared by attorney for debtors (not signed), filed herein December 10, 1941, and Objections thereto by petitioner, Myrtle D. A. Peck, appellant herein.

(12) Order of Court of December 10, 1941, denying petition, granting restraining order, and referring Petition to Commissioner.

(13) Notice of appeal.

(14) Bond for costs on appeal.

(15) Reporter's transcript of proceedings at hearing of appellant's petition, December 24, 1941.

(16) This designation.

Dated, this 17 day of January, 1942.

JAMES P. CLARK

James P. Clark, Attorney for Appellant.
704-6 Grant Building
355 South Broadway
Los Angeles, California (MU-8480)

Received copy of the within designation of papers for record on appeal this 17th day of January, 1942.

PAUL LEITER

Attorney for debtors

Received copy of the within designation of papers for record on appeal this 17th day of January, 1942.

C. P. VON HERZEN

Conciliation Commissioner.

[Endorsed]: Filed Jan. 17, 1942. [40]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, R. S. Zimmerman, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 40 inclusive contain full, true and correct copies of: Petition for Composition or Extension; Approval and Reference of Petition to Conciliation Commissioner; Application for Confirmation of Composition or Extension Pro-

posal; Certificate of Conciliation Commissioner; Notice of Hearing; Petition of Myrtle D. A. Peck for Leave to Proceed with Action; Order to Show Cause; Affidavit of Service of Order to Show Cause; Affidavit of Paul Leiter; Order Permitting Filing of Application for Confirmation; Minute Order for Confirmation of Composition and Reference of Petition of Myrtle D. A. Peck to Commissioner; Proposed Order Confirming Composition and Denial of Petition of Myrtle D. A. Peck; Objections to Proposed Order; Order Confirming Composition and Referring Petition of Myrtle D. A. Peck to Conciliation Commissioner; Notice of Appeal; Bond for Costs on Appeal; Statement of Points; Designation of Record; which together with the Reporter's Transcript of Proceedings constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I do further certify that the fees of the clerk for comparing, correcting and certifying the foregoing record amount to \$11.30, which amount has been paid to me by the Appellant.

Witness my hand and the seal of the said District Court this 14th day of February, A. D. 1942.

[Seal]

R. S. ZIMMERMAN,

Clerk,

By EDMUND L. SMITH

Deputy.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF PROCEED-
INGS ON HEARING ON MOTION FOR
ORDER CONFIRMING COMPOSITION,
AND PROCEEDINGS ON HEARING ON
PETITION OF MYRTLE D. A. PECK FOR
LEAVE TO PROCEED WITH TRIAL OF
A CERTAIN ACTION PENDING BEFORE
THE SUPERIOR COURT OF THE
COUNTY OF LOS ANGELES, ETC.

Appearances:

Paul Leiter, Esq.,
for Debtors.

James P. Clark, Esq.,
for Myrtle D. A. Peck. [1*]

Los Angeles, California,

Monday, November 24, 1941, 10 A. M.

The Court: Proceed, gentlemen.

Mr. Leiter: That matter, if your Honor please, is an application for confirmation of composition or extension proposal under Section 75, a to r. As the Court can see from the file, the petition and the exhibits, a majority in number and amount of the creditors have agreed to the composition proposal, and the Conciliation Commissioner has made his certificate that in his opinion the compromise is offered in good faith. We have tried to comply with the rule of General Order 50, and I believe

*Page numbering appearing at top of page of original certified Reporter's Transcript.

that the file reflects the consents, as well as the claims, to the proposition offered, which is now up for confirmation.

The Court: Mr. Clark, you are representing the other side?

Mr. Clark: I am representing the petitioner, if your Honor please, for leave to proceed in the state court in a case that was commenced a long time ago. In that case there was involved a water right. My client owned a right of way and a pipe line that ran across the ground of this bankrupt. She and her predecessors had owned that since '94. It was completed in '95 and is very ancient. This bankrupt bought this property in 1939. Then the acts that we complain of took place after that, and after trying by persuasion to get a desist from trespass, on October 1, 1940, we brought the [2] action for injunction, damages and costs, and to quiet the title. The case was tried once before a judge pro tem. We reached about the end of the trial, and the judge pro tem had pressing matters of his own and he had to leave the case, so it was sent back, assigned for trial again on the 12th day of May of this year, and we proceeded to try it and put in four days on it and reached nearly the end again. Then this bankruptcy petition was filed.

Before that, we stipulated in open court for a judgment, but the bankrupt, anticipating this action probably, refused to allow her attorney to approve the decree.

The cause was set for trial and continued. Now we are here asking leave to go on with that trial. It was reset for the 25th of this month, but on account of the appointment of Judge Vickers, before whom it is pending, for a short while to the appellate branch of the Superior Court, it went over to the 5th of December, and there it stands.

Of course, we have no part in this composition. We have not appeared in that matter, and have no objection to it, except the very last clause of the certificate of the Commissioner, which suggests that jurisdiction of this water rights controversy be retained. There is a last paragraph and a general approval in his report that might carry an implication that that was approved also, so we would ask that that approval be withheld as to that part of it until your Honor decides whether or not we are entitled to this leave. [3]

We have set up the matter very fully in the petition, and it is a border-line case as to whether the Federal Court has any jurisdiction at all upon it, because it is not an asset of the bankrupt, but this was property of the petitioner and it was trespassed upon by the bankrupt, and we sought to restrain them, and a restraining order was granted on the 1st of November, 1940, by Judge Wilson, and they are not permitted to use it for irrigation but for household use and sprinkling of the lawn that was around the house, and that injunction is in force now, and has been right along.

Mr. Leiter: Pardon me, Mr. Clark. I don't wish to interrupt, but there is nothing before the court. I know nothing about this petition or any facts alleged, other than the fact that some one served me with a copy of an order to show cause why a certain petition should not be heard today, and also my clients have not been served, because they have not communicated with me. At this time, if your Honor please, I object to any matters being heard before the court other than what is before the court on the application for confirmation.

The Court: The certificate of the Conciliation Commissioner contains the following:

“That a question as to whether or not a particular water right should be determined in the State Court, or lawsuit be held in abeyance under and pursuant to section 75 of the Bankruptcy Act has come up, and for that reason it is advisable that the Conciliation Commissioner and the above entitled court retain jurisdiction of the farmers [4] and debtors, and their property.”

Mr. Clark desires to proceed in the state court to have litigated and determined the controversy that has been provoked, and in so far as that issue is concerned, he is interested in this proceeding.

Mr. Leiter: I will stipulate right now in open court, since I have been served with that order to show cause. I will write a letter to my clients and get an answer to his petition, and also authorities

to this court, showing that the jurisdiction is in this court. We should be given a chance to reply, also, alleging our side of the suit, for the court to determine whether or not the particular water right set out in the deed is a property right and asset of the bankrupt, without which the bankrupt might be forced to lose everything, and the creditors who have consented to wait for their money might be jeopardized, because we have no water, and then, if and when that matter is presented to the court, and it is found to be a property right, the Federal Court has jurisdiction.

I believe there is a section in the Bankruptcy Act—I don't know which it is, because I am not familiar with bankruptcy work—it may be 178—which provides that a trustee in bankruptcy cannot maintain an action in a court where the bankrupt could not have maintained it prior to the bankruptcy, and the Supreme Court, in interpreting that particular section, held that jurisdiction of the property was vested in the Federal Court. That was in interpreting a section of the Bank- [5] ruptcy Act which said that if we could not have brought this action in Federal Court before bankruptcy, then the trustee, the Conciliation Commissioner, or maybe even the farmer, could not bring it afterward. However, I think one of the sub-sections of 75 says "Except upon hearing before the court no proceeding can be had." It says that jurisdiction shall be in this court. So, if it please this court, I

don't particularly object if the court does not approve the latter part of the sentence that says the Conciliation Commissioner should retain jurisdiction, and would be perfectly willing, if the court or Mr. Clark would consent to a certain time, say a week or ten days, to get my clients in to answer the petition.

I did not represent them in the state court. I would be glad to put in an answer to his petition, and points and authorities, and the court could then determine whether or not this court has jurisdiction or whether or not the state court has, but at this particular stage of the proceeding I am at a particular disadvantage, because, as Mr. Clark knows, I did not appear in any other proceeding than this 75, and I would like to have an opportunity to put in an answer to his petition in support of the order to show cause.

Mr. Clark: As to counsel's statement that the bankrupts were not served, they were served, on the 17th, by depositing a copy of the order to show cause, attached to a copy of the petition, in the post office, and it was mailed to them at their address set out in this bankruptcy proceeding here. [6] That is Lake Hughes, California, up in Antelope Valley. And an effort was made by my process server to serve them. They appeared to be in town, but contact was not made, and after staying two or three hours, the party there at the place said, "Well, probably they are at Lancaster by this time." They departed from town, and the whole circumstances

would lead me to believe that they were avoiding this service. The next morning Mr. Leiter was served, himself, personally. That envelope of the service had my return address on it. The letter never came back, so undoubtedly they received it. Now, if they elected not to reply to it or make any response to it, that is their own affair, but certainly Mr. Leiter had it on the 18th of this month, and the order provided that a copy should be served on him.

Now, as to the jurisdiction, I am in effect conceding the jurisdiction of the Federal Court by making this application under Section *o* of 75 for leave to go ahead in the state court. I am not saying that there is not any jurisdiction. I say it is doubtful, it is questionable; but conceding the jurisdiction of the Federal Court, I am asking leave to go ahead. The authorities certainly are ample, and I have many of them here, where leave had been granted to the state court, and it is rather favored, particularly in a case that has long started and was partially tried before this bankruptcy proceeding was commenced, and the circumstances of the bankruptcy lead me to believe that they were dodging into the arms of the [7] bankruptcy court to avoid a judgment.

The Court: I am just wondering whether the jurisdiction should not be before the Conciliation Commissioner instead of the state court.

Mr. Clark: I have authorities on that point, your Honor. They hold that the order under sub-section

o should be made by the judge, and there is a very recent decision, the McFarland case, 112 F. (2d), in which the Ninth Circuit construed the language of that sub-section *o*. There has been some doubt about it, and it is a bit ambiguous, but they finally set it at rest by holding that that language, "after hearing a report by the Conciliation Commissioner," meant his report on the adjustment with creditors, such as has been filed here. That is what has been holding me up all the time.

The Court: I think I remember having read that case, but I don't remember the principle applicable here, McFarland against West Coast Life Insurance Company, 567?

Mr. Clark: Yes; that is it, your Honor.

The Court: Judge Wilbur's concurring opinion throws light on the real crux of the problem, it seems to me, that while here there was objection, in the McFarland case there was no objection urged by anyone to the court making the order that it did make, and therefore the question of jurisdiction was properly decided, that it had power to make the order. Judge Wilbur throws a good deal of light on our problem in his concurring opinion, where he cites the case of Union Joint [8] Stock Land Bank v. Byerly. We will read a little of it. I can't pick out the part that I think is germane without reading the context. "I concur in the conclusion reached." He concurs in the conclusion reached that the lower court clearly decided the question of the jurisdiction and power to hear the

petition for leave to foreclose the lien. That is all the lower court decided, and Judge Wilbur says he concurs in the conclusion reached. "I believe, however, that the phrase in subdivision *o* of Section 75, quoted in the main opinion, refers to a hearing and report by the conciliation commissioner upon the petition for leave to enforce a lien upon the property of the farmer."

That means, it seems to me, that the proper method, if the petition is properly filed under Sec-75, *a* to *r*, is to divest the state court, or any other court, of authority over the res and transfer it to the court of the Conciliation Commissioner, and that all matters are to be adjudicated and determined in that forum, subject to review by the judge of the court. That was the view that I suggested I thought would be the proper course to take, and I think that view is strengthened by Judge Wilbur's concurring opinion.

Mr. Clark: Did your Honor notice that in the majority opinion, the two judges concurring specifically construed that language, but they did not at all agree with Judge Wilbur, who was more or less dissenting on that? But they construe the language of sub-section *o* to mean the hearing as to creditors [9] and settlement of their claims, and that report was the report of the Conciliation Commissioner, filed with the judge of the District Court for confirmation. As I recall it, that is the exact construction of the language.

The Court: That is true. They do say that.

Mr. Clark: That is the majority, and they said

that was the only proper construction of the section. It seems to me that the opinion of the court would be the controlling pronouncement in that case.

The Court: Unless, of course, it was just dicta. The only point before the appellate court was the question as to whether or not the lower court had erred in assuming jurisdiction to make the order which it did, permitting the sale. Now the record shows that they all acquiesced in the hearing, shows there was no dissent and no objection to the procedure. The only question was one of jurisdiction, whether the court had power to do it under the statute. That was the question decided. What they said in deciding it, I think, is pure dicta, and it seems to me that we have as much right to give weight to the reasons which are asserted by the third concurring judge as we have to those of the majority judges. There is no dissent. They all agree that the judgment should be affirmed that the court had jurisdiction to do what it did. The only difference is that in analyzing the case the third judge says that he does not agree with his associates that the power of the court was the action of the judge. He says that [10] the court had a greater power than that if it sought to exercise it, which it did not seek to exercise in the McFarland case. He says: "As stated in the main opinion, the appellant consented to a hearing of the application by the court before the hearing on the confirmation of the proposal for composition and ex-

tension. The appellant did not object to the hearing of the application of the appellee for leave to sell upon the ground that a prior hearing before the conciliation commissioner was necessary."

In other words, they all acquiesced. There was no affirmative opposition interposed by anyone to what the court was doing, but they questioned the power of the court to do anything at all.

Judge Wilbur says: "Not having made the point in the court below he cannot make it in this court."

I think that bears out this court's deduction that what the appellate court decided was the power, the jurisdiction of the lower court to make any order, and the three judges in the appellate court said they agreed that the judge in the lower court had the right to make an order, but they don't go into the question as to whether or not the lower court had the right to say, "Well, now, we shall not permit the state court to proceed with its proceeding, but we shall take over the entire matter and refer the adjudication of the settlement of this claim to the conciliation commissioner."

Your claim is a little different than the claim in the [11] McFarland case. They were claiming a right to sell his property under a trust deed to enforce the lien. What you are asserting is the right to the right of way and the uninterrupted use of that pipe line. It may be that they fall in the same category, but they are not precisely the same type of relief sought. But regardless of the specific relief, they are both proceedings in the state court.

In the McFarland case I believe it was a sale under a trust deed that did not require foreclosure.

There is a footnote here under the main opinion, under footnote 2. The main opinion states this: "To what 'hearing and report' does the statute refer? So far as we are advised, the decided cases afford no answer to the question. It was present in *Union Joint Stock Land Bank of Detroit v. Byerly*, 60 S. Ct. 773, * * * decided April 22, 1940, in which the Court of Appeals for the Sixth Circuit was reversed. 106 F. 2d 576. But neither court undertook to interpret the phrase. Whatever may be the preliminary step required by it, the step had not been taken in that case for no commissioner had as yet been appointed at the time the court 'erroneously' permitted a sale."

Footnote 2 reads thus: "2 In *Union Joint Stock Land Bank of Detroit v. Byerly*, supra, it was held error for the district court, in the absence of the preliminary step required by subsection *o*, to permit a sale, but it was said the court had jurisdiction in the premises. However, it was pointed [12] out that until confirmed by the court the sale amounted to no more than an unaccepted offer to purchase. Such is not the situation here, since under the California law a sale under a deed of trust is absolute and cuts off the debtor's equity of redemption."

Now, doesn't that all just spell this, that in the hearing of these petitions the court has the power to hear them either simultaneously, concurrently, or

has the power to hear even the petition of the kind that Mr. Clark's client has projected, in advance of the petition for composition or extension. It now is proposing to hear the two of them concurrently, and in view of the Conciliation Commissioner's certificate in which he says there is in dispute here, in abeyance, the determination of the right of way over this property for pipe line purposes, Mr. Clark comes into court, on the day that is set for the hearing of the petition to compose the debt or extend it, and asks leave to proceed with his case in the state court.

It seems to me that this McFarland decision is absolute authority on the right of this court to say whether he shall have the right to proceed or not; and if it says so, then as a corollary it has the right to say, "Well, instead of proceeding in the state court we will proceed in this court."

Mr. Clark: On that, I read the Byerly case and those other cases cited, and they did touch on the jurisdiction question, that no report had been filed by the Conciliation [13] Commissioner, and under subsection *o* a report must precede the vesting of jurisdiction or the action of the District Court under whatever jurisdiction it has, to grant leave to proceed in some other case or to sell some asset.

As your Honor points out, we are not foreclosing a lien that affects the property rights of the bankrupt, or to sell any property, but we are seeking to try and go on and complete a case that was initiated long before this bankruptcy.

Now, what was the point of the appeal of the bankrupt in the McFarland case? His point was, as I take it from the case, that no report had been filed by the Conciliation Commissioner involving the question of leave to sell that particular property or on that matter. Otherwise, I don't understand that his appeal had any point at all; and it was in response to that that the judge who wrote the opinion made his construction of subsection *o*.

I have listed dozens of cases, and that is the first and only case that has come out flat-footedly and construed that section and said that the hearing and report mentioned in that section referred to the report of the Conciliation Commissioner on the adjustment and settlement and until that is filed it is improper to seek leave of the court to proceed. Now, it is the court that grants the leave. After all, the Act vests that authority absolutely in the District Court, in the Federal Court, and it has to be preceded by a report of the Conciliation Commissioner. That is the language of sub- [14] section *o*, and when they say that the hearing and report referred to in that part of the Bankruptcy Act providing that until petition is made to and granted by the judge after hearing and report by the Conciliation Commissioner a proceeding for the sale of property under lien shall not be instituted, it does not refer to a hearing and report by the Commissioner on the petition for leave to sell. It says specifically that it does not refer to that but refers to the hearing before the Commissioner of the debtor's composition

and extension proposals, and the Commissioner's report thereon.

Now, we have that filed on the 6th, and as we have set out the proceedings, I was waiting all summer and fall for them to get that report in. As the Commissioner states in his report, the first hearing before creditors was on the 17th of July. His certificate is signed on the 22nd of October and filed here on the 6th of November. If that language expressed by the majority in that McFarland case means anything, it is clear that it is the first flat-footed construction of the meaning of sub-section *a* and decides specifically that it is not a hearing on the application to proceed but it is the hearing of the creditors and the adjustment of debts and the Commissioner's report as to what should be done as to those debts.

As far as that is concerned, we have no part in the proceedings before the Commissioner. On an ex parte application of Mr. Leiter, there was a restraining order issued. I at- [15] tended the hearing to learn what was going on, and the Commissioner asked me for a statement of this matter. I told him what it was. With the agreement of Mr. Leiter, that restraining order was then dissolved by the Commissioner, with the understanding that I would proceed and make the application before the court at the proper time, and I have been waiting all the time to do it, knowing that that McFarland case has set up that that report had to be here before we could apply to the judge, and when it was here the judge had the jurisdiction to consider the matter.

The court distinguished this case that is before you from this application for leave to sell an asset of the business. We are not seeking to sell anything that belongs to her, but we are claiming a right to restrain these people from their repeated trespass, and incidentally determine whether or not there is any water right.

The federal cases are full of decisions where the state court has been allowed to proceed. In a very recent case, *Sherman v. Buckley*, 119 F. 2d 280-282: "In spite of the fact that the jurisdiction of the bankruptcy court is usually described as 'exclusive,' it may consent to have the interests of third persons in property of which the bankrupt had possession adjudicated in a state court if that is more convenient."

The Court: I don't think you need cite those, Mr. Clark. I think it is a discretionary matter. Both forums have concurrent jurisdiction, I think, in bankruptcy, in determination [16] of those rights. The question is not one of the right of the court to do it, but it is the proper exercise of discretion as to whether it should be done, and this is what appeals to the court rather strongly. If the spirit of Section 75, *a* to *r*, is to afford a farmer debtor a reasonable opportunity to rehabilitate himself, first, by endeavoring to get a majority of his creditors to agree to withhold the enforcement of their legal rights, and if the farm, or ranch as we call it here, needs water, which it does, I think, query: aren't we defeating the whole purpose of the stat-

ute by permitting another forum to determine in an independent action the whole crux of this problem? Because the crux of this problem is the ability of the farmer debtor to rehabilitate himself out of his property after having obtained the agreement from his creditors that he may have a reasonable time in which to do so. Now, if, after having so agreed, the court permits some other forum to adjudicate and determine the right to the sinew of war, to-wit, the water, aren't we using our discretion in such a way as to defeat the whole spirit of the Act?

Mr. Clark: In reply to that I would say that the Federal Court could not and would not lend itself to the appropriation of the property of a third party, and that is exactly what we claim here, that this water for many years has belonged to the petitioner, and for over forty years to her predecessors in interest.

The Court: I agree with you there. [17]

Mr. Clark: Can the bankrupt commit a trespass and take this water for their use and expand its use and all that? We are not responsible for her creditors, and we wouldn't be called upon, under the law, to furnish anything to liquidate or pay her creditors. She has a well that she drilled on this place that is for the purpose of irrigation, but because she didn't seal it when she drilled it, it is not good for ordinary household uses.

The Court: Our minds are not together, Mr. Clark. I am not prepared to dispute the verity of

what you say. I am talking about a forum to try the issues. You are talking about the merits of an issue. I am talking about a place where that issue should be tried, and you are talking about the merits of the issue itself.

Mr. Clark: The only place a trial could be had upon the merits would be before some judge of the Federal Court, certainly not before the Conciliation Commissioner.

The Court: Why not? Where is there a case or a statute that says that the judge shall try it? Isn't the purpose of the Act to refer these matters, ab initio, to the Conciliation Commissioner, to have him determine that issue, subject to review by the judge of the Federal Court? Suppose someone wants to foreclose a lien on the property, or a mortgage, and they have commenced their suit in another court before the farmer debtor seeks to apply the relief provisions of the Bankruptcy Act and Section 75, doesn't that transfer to this court? [18] Isn't that the plain meaning of sub-section *c*, that all others shall hold off until such time as the court—and that means the Conciliation Commissioner, when it is referred—shall hear the matter? It doesn't mean the judges shall devote their time to these debtor proceedings ab initio.

Mr. Clark: If your Honor please, the action in the Federal Court is stayed, but we are talking about trying the case on the merits. That is what we are asking leave to do, and I think the disposition of the Federal Courts has been to grant the right

to proceed in the state court, particularly where the question of the possession of the bankrupt is doubtful. It seems to me that this is doubtful.

If here is a property that a third party claims they have a right to, and the third party is in possession on the right of way and the pipe line, and we are seeking only to restrain the bankrupt from trespassing on it, then that is an issue that should be tried, ordinarily, in the state court; or, conceding the possession of the bankruptcy court, it is one that should be relegated to the state court.

There is a case right on that particular point where the question of possession itself is doubtful, a recent case—I think I read your Honor that one—no, I didn't—where they held that the bankruptcy court may permit a mortgage or trust deed to be foreclosed in state court on a showing of entire lack of equity. That is *Comer v. John Hancock Mutual Life Insurance Co.*, 80 F. 2d 413, on allowing the state court to [19] try the question of title—this is the point—to property in the actual or constructive possession of the bankruptcy court where the court feels that the matter may be more expeditiously determined and possession of the bankruptcy court is perhaps doubtful.

The Court: That is the point exactly. I don't think there is any doubt about the possession of the res, as far as this proceeding is concerned. There may be, and there is, undoubtedly, from the petition that has been filed, an issuable question as to the right of way of this pipe line, as to wheth-

er or not they are permitted to tap the pipe line and take any portion of the water, or as to whether they are encroaching upon the owner of the right of way and the easement. There is an issue on encroachment upon the easement.

There is no doubt in my mind, unless there is some authority that I haven't in mind (and there may be) that we have the authority to permit the state court to proceed, if we think the circumstances are such, in the exercise of discretion, that we ought to do so, or to require that it be retained here. I don't think there is any question about that. Very often we do this in cases: We permit the state court to proceed, without the right to execute the judgment, until such time as the matter is brought to the court's attention here where it can be supervised by the bankruptcy court.

Mr. Clark: As to any damages or costs, the court would retain or could retain jurisdiction of it, but could allow [20] the state court to try the title, and particularly where so much money has been already expended and the case has been partly tried, with just a small piece of it remaining before the judge would render a decision. It seems to me if there ever was a case where leave would be granted to proceed in the state court, conceding the jurisdiction of the Federal Court, that leave would be granted here, because it would be expeditious, as this case cites here. That is a very recent case. Let me call your attention to that case. I didn't give you the citation. It is in the Matter of

American Fidelity Corporation, Ltd., a California case in 1939, a very late case, 28 F. Supp. 462. There it was doubtful whether the court had jurisdiction of the matter or not, but the question was whether it could be more expeditiously determined. In all other cases they have said "at less expense."

We have spent all the money; we have tried this case practically twice in the state court, and we feel that we ought to be allowed to proceed and finish it up.

Mr. Leiter: If your Honor please, I don't believe a true picture has been presented to the court, for the following reasons: In the first place, the order to show cause says "show cause why petition should not be granted" and "to be served upon her." The order has not been complied with.

There are always two sides to a lawsuit, and we don't even claim under a purported color of title. We have title to use the water for certain purposes. Whether "domestic purposes [21] of the farmer" means for taking a shower or watering stock is questionable. Counsel has gone to great length to prove that the case must be tried. If our petition were before the court, the court would have the following matter before it and could decide that the Federal Court should hear it, for the following reason: The very purpose of the Act was that when a farmer is overwhelmed he can come into the Federal Court. The only time a farmer can come into the Federal Court, under a

to r, of course is when he cannot get relief from a state court, or creditors are pressing him.

In this particular instance, our petitions would deny the allegations of Mr. Clark; and aside from the fact that no stipulation was agreed on, the judge was so unfamiliar with Section 75—in state court a lot of lawyers are unfamiliar with Section 75, too—that at first he expressed doubt from the bench as to whether this court could even stay him from acting, (and I was compelled to get a restraining order to restrain Mr. Clark from proceeding) and I could not get an order to show cause directed to the Court.

The Conciliation Commissioner told Mr. Clark the reason he issued that restraining order, which was unnecessary because there is an automatic stay, was because he was informed the court would proceed anyway.

There is no further need for that restraining order being there. The court has made the remark from the bench, and it is in the record, that if it takes a day, a month, a year, he [22] is going to determine the matter. He even suggested that Mr. Clark amend his complaint to ask for more damages.

We feel the very purpose of the act is defeated in permitting this to go back to the state court. If we are trespassers, this court is equally competent, if not more so, to determine whether or not we are trespassing. I believe, if your Honor please,

in the interest of justice, as well as to carry out the acts of Congress, the farmers and their property should be under the jurisdiction, and that if anything, this court should exercise its discretion and retain jurisdiction in this court.

Mr. Clark: Before your Honor makes decision, if you will look at the schedule there before you, you will see that these people were apartment house owners, one forty-room apartment house, owned, not leased and run. Their farming business is just a colorable thing because they have a little chicken ranch out there.

The Court: Of course, there should have been objection. If the objection were made that they were not actually bona fide farmer debtors, we could have determined that.

Mr. Clark: Counsel has made such a plea about this poor farmer, I don't know whether your Honor would——

The Court: I am not considering the merits of the matter at all. I don't think that is before us. I am trying to avoid it and at the same time do what I think should be done. I think we will take the position that we will continue the [23] restraint against the proceeding in the state court, and confirm the order of the Conciliation Commissioner on the composition and extension, without prejudice to the assertion of the rights set forth in the petition of Myrtle D. A. Peck before the Conciliation Commissioner, to whom that petition is referred, with authority to proceed to hear and determine

the issues that are presented by said petition, subject to review by proper proceeding before the judge of this court.

It seems to me that is the proper order to make. If the creditors, or any of the creditors, take the position that this is not a good faith proceeding, that the petitioners are not farmers within the meaning of the Act, that does not foreclose an inquiry upon that, except possibly as far as those creditors who have acquiesced in the composition are concerned, and, on the other hand, if we should relinquish the control of the determination of the right to the water, there isn't any asset there at all; the asset is gone, if there is any asset.

Mr. Clark: The asset is in the forty-room apartment house that is in the possession of the bankrupt.

The Court: I am not talking about that. There has been no proceeding before the court questioning the right of these people to employ Section 75. The petition of Peck does not recite that. The petition of Peck assumes that the court has jurisdiction under Section 75 to hear the matter, but it asserts that there is a right of way which is being encroached [24] upon by the petitioner. That can be litigated here just as satisfactorily, and I think perhaps more justly, than it can in other forum. I am not speaking of any particular forum.

The whole project there depends on water. If there is no water, there is no ranch. You can't feed turkeys or raise crops without water. I am talking

about ranch property. I am not talking about taking a bath, either in a ranch or apartment house. If they have no right to the water, it will fail. Then they may go under sub-section s, which will complicate it more.

Mr. Clark: They do raise turkeys. They have a well they claim they water them with.

The Court: You prepare the order, Mr. Leiter, and serve it upon Mr. Clark.

Mr. Clark: That is a denial of the petition, your Honor?

The Court: No; I am denying the prayer of the petition to transfer the proceeding from this court to the state court. I am continuing the order of injunction in force. The restraint that is already in effect is continued in force until the further order of this court, and I am referring the petition of Peck to the Conciliation Commissioner for further consideration, with plenary power to determine the issues that are framed by it, subject to review of the decision of the Conciliation Commissioner by the judge of this court.

Serve the order on Mr. Clark, and he will endorse it.

You may have an exception to the ruling, Mr. Clark. It [25] may be that you will want it reviewed.

Mr. Clark: The reason I asked if you denied the petition was that we might consider appeal.

The Court: I am not denying the petition. You may be right on the merits. I am not saying that you are not.

Mr. Clark: This petition was merely for leave to proceed.

[Endorsed]: Filed Jan. 17, 1942. [26]

[Endorsed]: No. 10052. United States Circuit Court of Appeals for the Ninth Circuit. Myrtle D. A. Peck, Appellant, vs. Frances Howard and Fred Howard, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed February 16, 1942.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the Circuit Court of Appeals for the
Ninth Circuit.

No. 10052

MYRTLE D. A. PECK,

Appellant,

vs.

FRANCES HOWARD AND FREDERICK
HOWARD,

Appellees.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY ON THE
APPEAL, AND DESIGNATION OF THE
PORTIONS OF RECORD FOR CONSID-
ERATION THEREOF.

A. For a statement of points to be relied upon under Rule 19(6), on this appeal, appellant hereby refers to and adopts appellant's statement of Points under Rule 75(d), Rules of Civil Procedure, heretofore filed in the United States District Court, and set out in the Clerk's transcript of record at pages 35-38 inclusive.

B. Appellant further designates as portions of the record to be printed the whole of the record on appeal, as certified by the Clerk of the District Court and filed herein, including the reporter's transcript, as necessary for the consideration of appellant's points on appeal.

Dated February 13th, 1942.

JAMES P. CLARK

Attorney for Appellant.

Received copy of within designation of Points and portions of record to be printed this 13 day of February, 1942.

PAUL LEITER,

Attorney for Appellees.

[Endorsed]: Filed Feb. 16, 1942. Paul P. O'Brien, Clerk.

No. 10052.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MYRTLE D. A. PECK,

Appellant,

vs.

FRANCES HOWARD and FRED HOWARD,

Appellees.

BRIEF FOR APPELLANT.

JAMES P. CLARK,

706 Grant Building, Los Angeles,

Attorney for Appellant.

FILED

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No. 10052.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

MYRTLE D. A. PECK,

Appellant,

vs.

FRANCES HOWARD and FRED HOWARD,

Appellees.

BRIEF FOR APPELLANT.

Statement of Pleadings and Jurisdiction.

On May 26, 1941, appellees filed in the United States District Court their petition under Section 75 of the Bankruptcy Act, seeking a composition or an extension of time to pay debts, and other relief under said Act [Tr. pp. 2-5]; this petition was approved and referred to Constantine P. Von Herzen, Esq., Conciliation Commissioner, on same date. [Tr. pp. 4-6.]

On November 6, 1941, application for confirmation was filed in the District Court, signed by one of appellees but unverified [Tr. pp. 7-9]. A certificate of Conciliation Commissioner, dated October 22, 1941, was filed in the District Court on November 6, 1941 [Tr. pp. 9-10]. Notice of motion to confirm filed on November 6, 1941 [Tr. p. 11].

On November 17, 1941, appellant filed her petition for leave to proceed with the trial of an action then and since October 1, 1940, pending in the Superior Court of the State of California, in and for the County of Los Angeles [Tr. pp. 12-19]; and on this petition an Order to Show Cause on November 24, 1941, why same should not be granted, was issued on November 17, 1941, as against appellees and one Paul Leiter, their attorney [Tr. pp. 19-20]. On the 17th day of November, 1941, service of Order to Show Cause, with copy of petition of appellant, was served on appellees by mail, and on the 18th on their attorney, Paul Leiter, Esq. [Tr. pp. 21-22]. On the same day, said attorney filed his affidavit in the District Court, setting out that the first meeting of creditors was held on July 17, 1941, and after continuances, consent of a majority of the creditors to a composition was obtained and "that debtors did file application for confirmation of composition on or about November 9, 1941." (*Sic.* Does this mean with Conciliation Commissioner, with whom the law requires such application to be filed? If so, this was three days after the record shows it was filed with the District Court.) The affidavit then sets out a mistake of law that affiant made in misconstruing Rule 50 of the Supreme Court [Tr. pp. 23-24]. On this affidavit an order was made by one of the judges of the court waiving compliance with Rule 50 [Tr. p. 25].

Motion for confirmation (1) and petition of appellant for leave to proceed; (2) came on for hearing in that order but were heard at the same time [Tr. p. 26]. The motion to confirm granted and appellant restrained from

proceeding further in the state court, and referring petition of appellant to Conciliation Commissioner, etc. This was first covered by a minute order [Tr. pp. 26-27]. Then the attorney for appellees prepared an order [Tr. pp. 27-29], which was not signed; and to which appellant filed written objections [Tr. p. 30]; and finally the judge hearing the matter, on December 10, 1941, prepared and signed the order and judgment set out at transcript pages 31-32.

On January 8, 1942, notice of appeal to this Court from portions of this order and judgment was filed in the District Court and served [Tr. p. 33], and at the same time undertaking for costs on appeal was approved and filed [Tr. pp. 34-36]. Thereafter and on January 17, 1942, designation by appellant of points on which she intended to rely on appeal, was served and filed [Tr. pp. 37-41]. On the same date, designation by appellant of papers and matters to be included in the record on appeal was served and filed [Tr. pp. 41-43]; Certificate of Clerk of District Court [Tr. pp. 43-44]; Reporter's Transcript [Tr. pp. 45-70]; Transcript of Record filed with Clerk of this Court, February 16, 1942 [Tr. p. 70]; Statement of points on which appellant intends to rely on appeal, and designation of the portions of the record for consideration thereof, served on February 13, 1942, and filed herein February 16, 1942 [Tr. pp. 71-72].

This appeal was taken under Section 24a of the Bankruptcy Laws as amended in 1938 and 1939; also within the time fixed by Section 25.

Statement of Case.

Both appellant and appellees are residents of the *State of California* [Tr. pp. 2 and 12]. Appellant owns and is in possession of ranch property in the west end of Antelope Valley, in Los Angeles County, California, consisting in part of Section 16 in Twp. 8 N., R. 16 W., S.B.M. The appellant is also the owner and in possession of a certain pipe line, right-of-way for the same, and the water flowing therethrough, running from her above described property into the hills in a southerly direction, a distance of about five miles, where said pipe line gathers and takes into its flow the waters of certain springs. That the appellant and her predecessors in interest have owned and maintained said pipe line and right-of-way for more than forty years last past, and have maintained and used same to convey water from said springs to said ranch for domestic and agricultural purposes. That the appropriation of the water arising from the springs was first made by appellant's predecessor in interest in 1894, and pipe line completed and water flowing to said ranch by July 1, 1895; and that ever since such completion, appellant and her predecessors in interest have owned, been in possession of, and used said pipe line, right-of-way and waters. That at the time said waters and right of way were appropriated, the same was located on and over public land, unappropriated, and belonging to the United States.

That appellees in January, 1939, bought 40 acres of land, situated to the south of appellant's ranch about four miles, and being the NE $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Section 31, Twp. 8 N., R. 16 W., S.B.M., in Los Angeles County, California. Appellant's pipe line and right-of-way for same crosses appellees' land from south to north. That when the predecessor of appellant constructed the pipe

line and acquired the right-of-way for same across the 40 acres of land now owned by appellees, the same was unappropriated public land, and that by reason of this fact appellant's predecessor in interest, to-wit, one Henry Hatch, acquired a vested interest in this right-of-way.

U. S. R. S., Section 2339, provides:

"That whenever by priority of possession rights to the use of water for mining, agricultural, manufacturing, or other useful purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of the courts, the possessors and owners of such vested rights, shall be maintained and protected in the same, and the right-of-way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed."

In *DeWolfskill v. Smith*, 5 Cal. App. 175, 182, the above section is construed:

"Later this Act was amended by a provision to the effect that all homesteads allowed should be subject to vested and accrued water rights and rights to ditches used in connection therewith.

"By posting the notice appellants from that time became vested with the right to the use of the stream of water then flowing from these wells, together with the right to construct over and across the land the necessary ditches to divert and conduct the same to the place of intended use."

In *Happy Valley Land, etc. Co. v. Nelson*, 169 Cal. 694, 695-6, held:

“These rights of plaintiff’s predecessor, having been acquired over the government lands before their sale in private ownership, gave a vested, possessory title under the Act of Congress of 1866, and required no further or other record title for their support.”

In *Smith v. O’Hara*, 43 Cal. 371, and *Simon v. Inyo Cerro Gordo Co.*, 48 Cal. App. 524, 540, the term “ditches” used in said Section 2339 is construed to include “pipes.”

The first predecessor of appellees to acquire any interest in the 40 acres involved herein was in December, 1895, or January, 1896, by settlement; the land was then unsurveyed government land, and unappropriated, except for the right-of-way for the Hatch pipe line, which pipe line was in place and in use. It was not until 1904 that patent was issued to appellees’ predecessor, and then it contained a specific reservation and exemption in favor of any rights theretofore acquired for ditches carrying water and appropriation made while same was government land.

That soon after appellees acquired their 40 acres, in 1939, they began to trespass upon appellant’s right-of-way and pipe line and to appropriate and use the water belonging to appellant flowing therein, to use the water extravagantly and wastefully; that appellant made many protests and objections in 1939 to appellees against such trespasses, and although they promised and agreed from time to time to desist, they did not do so.

On October 1, 1940, appellant commenced an action in the Superior Court of the State of California, in and for the County of Los Angeles, No. 456533, seeking to enjoin

appellees from continuous trespass upon appellant's right-of-way and wrongful use of water from such pipe line, to quiet title, and for damages and costs.

That on November 1, 1940, after hearing, a preliminary injunction was granted against appellees, restraining them from the use of water flowing in said pipe line for any use whatever except for household use and a reasonable amount to sprinkle a lawn.

That thereafter said action was set for trial March 5, 1941, and trial proceeded for about five days before a judge *pro tem.*, who then declined to proceed further with the case, on account of demands of his private practice. The case went over to be reset and was reset for May 12, 1941, when trial proceeded for another four days, when on May 15, 1941, a stipulation was made in open court for judgment in favor of appellant and against appellees, for a permanent injunction, damages and costs, but allowing appellees a stipulated amount of water for household use only, and the case was continued to May 26, 1941, to permit time to draw the decree. On May 26, appellees in open court withdrew from said stipulation and through their attorney announced that they had that morning filed a petition in bankruptcy. The case in the State court was continued from time to time and is still pending.

That appellant has been at great expense in the two trials of said case in the State court.

On November 6, 1941, application for confirmation of composition or extension proposed under Section 75, Bankruptcy Act, was filed in the United States District Court and proceedings were had, as hereinbefore set out, leading to this appeal.

Assignment of Errors.

(1) That the District Court erred in denying appellant's petition to proceed with the trial of the action pending in the State court.

(2) That the District Court erred in its order and judgment restraining appellant from proceeding with the trial and determination of her action then pending in the State court, in that the *res* involved in said action belonged to appellant and was in her possession.

(3) That the District Court erred in restraining appellant from proceeding further with her action in the State court, in that said action was one to restrain appellees from a continuing trespass.

(4) That the District Court erred in assuming jurisdiction to make an order and judgment restraining the prosecution of an action in the State court commenced more than four months prior to the filing of appellees' petition in bankruptcy.

(5) That the District Court was without jurisdiction to determine, either in a summary proceeding or in a plenary hearing, the matters involved in appellant's suit in the State court, and erred in referring appellant's petition "to the Conciliation Commissioner herein, with plenary power and with authority to proceed to hear and determine the issues that are presented by said petition."

(6) That the District Court erred in making such reference to the Conciliation Commissioner, in that neither the District Court nor the Conciliation Commissioner had jurisdiction to hear on the merits the issues involved in appellant's suit then pending in the State court, either in a summary or plenary hearing.

(7) That the District Court was in error in making said reference to the Conciliation Commissioner, in that a bankruptcy court does not have summary jurisdiction nor plenary jurisdiction without the consent of adverse party claimant, to hear and determine the property rights of such adverse claimant who is in the actual or constructive possession of property claimed by such third person.

(8) That the petition of appellant was one for leave to proceed in trial of case in State court, and that alone, and the District Court erred, against the objection of appellant, in ordering a hearing before the Conciliation Commissioner.

(9) That the District Court erred in refusing to recognize the rule of comity, in that appellant's action in the State court had been commenced eight months prior to filing of appellees' petition in the Bankruptcy Court, and that court was entitled to continue with a complete disposition of said case.

(10) That the District Court erred in refusing to grant appellant's petition, under the circumstances disclosed therein, and such refusal was an abuse of discretion, in that said action in the State court had been partly tried twice, at great expense to appellant, and was then in condition for an early determination.

(11) That under the provisions of sub-paragraph (o) of Section 75 of the Bankruptcy Act, it was not a condition precedent that the Court should have before it a hearing and report on the petition for leave to proceed in the State court; and if this was the purpose of the reference to the Conciliation Commissioner, this was error.

ARGUMENT.

I.

Construction of Sub-paragraph (o) of Section 75 of Bankruptcy Act.

“(o) Except upon petition made to and granted by the judge after hearing and report by the Conciliation Commissioner, the following proceedings shall not be instituted, or, if instituted at any time prior to the filing of a petition under this section, shall not be maintained,” etc.

In re Wogstad, 10 Fed. Supp. 349, 350, the phrase, “after hearing and report by the Conciliation Commissioner,” contained in sub-paragraph (o), has been construed to mean hearing before and report by Conciliation Commissioner as to agreement on a plan of settlement with creditors, and extension. In that case, at page 350, the Court said:

“Undoubtedly a bankruptcy court has the jurisdiction and right to allow a creditor to proceed under the first clause of paragraph (o), but this would seem to be limited to a petition made to and granted by the judge after hearing and report by the Conciliation Commissioner. The record fails to show that the Conciliation Commissioner, in this case, has reported to the Court, either that the creditors have agreed upon a plan within the scope of paragraph (g) nor has he reported to the Court that such plan has been attempted and has failed.”

It was definitely determined in the case of *McFarland v. West Coast Life Ins. Co.*, 112 Fed. (2d) 567, 569, that the "hearing and report" referred to in paragraph (o) is the hearing and report of Conciliation Commissioner on adjustment of creditors' claims and hearing of petition for an extension, etc. At page 569, the Court said:

"It has been suggested that the phrase refers to a hearing on the petition to sell. In this case the Commissioner neither heard nor reported on the petition. While the interpretation is arguable, we think it must be rejected. Subdivision o expressly provides that the petition is to be 'made to and granted by the judge;' and there is no express requirement that it be referred to the Conciliation Commissioner for hearing and report by him. The implication, indeed, is to the contrary."

The district judge hearing appellant's petition did not agree with this construction of paragraph (o) [Tr. pp. 52-55].

II.

Appellant Was an Adverse Claimant as Owner and in Possession of the Property Involved in the Action Pending in the State Court, and the Bankruptcy Court Had No Jurisdiction of Same.

In re Cadillac Brewing Co., 102 Fed. (2d) 369, 370, it was held:

“A court of bankruptcy is without jurisdiction to adjudicate in a summary proceeding a controversy over property held adversely to the bankrupt estate, unless the adverse claimant consents or the claim is merely colorable, and a claim is not to be held to be merely colorable unless a preliminary inquiry shows that it is so unsubstantial and obviously insufficient, either in fact or law, as to be plainly without color or merit and a mere pretense.” (Citing decisions.)

“It is well settled that a court of bankruptcy is without jurisdiction to adjudicate in a summary proceeding a controversy in reference to property held adversely to the bankrupt estate, without the consent of the adverse claimant; that resort must be had by the trustee to a plenary court.” (Citing numerous cases.)

Harrison, Trustee v. Chamberlain, 271 U. S. 191, 193.

In the case of *Louisville Trust Co. v. Cominger*, 184 U. S. 18 (very often cited), Chief Justice Fuller in delivering the opinion of the Court, in which it was held that the District Court, in a bankruptcy proceeding, did not have jurisdiction to determine in a summary proceeding

the rights of an adverse claimant to property, quotes this from an earlier decision of the Court, at page 25:

“We think that it could not have been the intention of Congress thus to deprive parties claiming property, of which they were in possession, of the usual processes of the law in defense of their rights. *Marshall v. Knox*, 16 Wall. 556; *Smith v. Mason*, 14 Wall. 419.”

To the same effect are the cases of *Galbraith v. Vallely*, 256 U. S. 46, 50, and *May v. Henderson*, 268 U. S. 111, 115.

“Neither exclusive jurisdiction of the debtor nor power to issue process outside the district, confers upon the bankruptcy court the power in a summary proceeding to decide, without the consent of an adverse claimant, a controversy concerning property in his possession, unless his claim be merely colorable. Were it otherwise, every bona fide possessor of property held adversely to a bankrupt could be haled into a distant Federal Court to defend his right to the property whenever the trustee in a reorganization proceeding should choose to corral him summarily.”

In re West Forest Fur Farms of America, 122 Fed. (2d) 232, 239.

In the case of *Dannell v. Wilson-Wierner-Wilkinson Co.* (6th Circuit), 109 Fed. (2d) 364, petitioners commenced an action in the State court to foreclose liens of laborers and material men, on money retained by Tennessee Highway Commissioner from payments to highway contractor, prior to adjudication that highway contractor was bankrupt; it was held, gave the Tennessee court prior constructive jurisdiction of the money, and

therefore exclusive power to settle controversies concerning the money, without being subject to *stay of such proceedings* by the bankruptcy court.

At pages 365-366 of the opinion the Court said:

“Error is based on the broad principle that an adjudication in bankruptcy vests all the property of the bankrupt in the trustee, as of the date of the petition, the filing of which gives the Bankruptcy Court jurisdiction that is paramount and exclusive, with possession and control of the estate, not affected by proceedings in other courts. The principle may at once be conceded as sound and of general application. *It applies, however, but to the property of the bankrupt.*” (Italics ours.)

And at page 366:

“But aside from these considerations, we must sustain the order below, upon the broader ground that the filing of the petitions to foreclose the liens in Davidson County Court, before the adjudication in bankruptcy gave that court prior constructive jurisdiction of the *res* and, therefore, *the exclusive power to settle controversies concerning it without being subject to a restraint of such proceedings by the Bankruptcy Court.*” (Italics ours.)

Citing *Straton v. New, Trustee in Bankruptcy*, 283 U. S. 318, where it was held that proceedings in a State court commenced more than four months prior to adjudication of bankruptcy could not be enjoined by Bankruptcy Court; quoting from page 331 of that decision:

“As heretofore noted, there are a few cases which have held that the bankruptcy court may enjoin proceedings brought prior to the filing of the petition, to enforce valid liens which are more than four

months old at the time of the bankruptcy; but those cases are contrary to the decisions of this Court and to the great weight of federal authority.”

Citing: *In re Maier Brewing Co.* (C. C. A. 9th Cir.), 65 Fed. (2d) 673, where order enjoining proceedings in State court was reversed. The Court, at page 674, said:

“If a State court, by proceedings to foreclose or otherwise enforce a valid lien instituted even within four months preceding the filing of a petition in bankruptcy, has acquired control of the property, the bankruptcy court, whatever its jurisdictional power may be, will not enjoin the continuance of such proceedings.” (Citing numerous Federal decisions.)

And again on page 674:

“In bankruptcy, as in equity, ‘one court will not snatch a *res* from another’s mouth.’ *In re Greenlie-Halliday Co.*, 57 Fed. (2d) 173, 174.”

In equity the principle is fortified by Judicial Code, Par. 365; 36 Stats. 1162; U. S. C., Title 28, Par. 379 (28 U. S. C. A., Par. 379).

Also an able opinion by Judge Wilbur. In *Ke-Sun Oil Co. v. Hamilton* (C. C. A. 9th), 61 Fed. (2d) 215, and citations of Federal cases at page 218, establishing the doctrine that the jurisdiction of a State court having first attached cannot be superseded, taken away or *restrained by writ of Federal court*. (Italics ours.)

In *Hoehn v. McIntosh*, 110 Fed. (2d) 199 (decided 1940), appeal involved an interlocutory order of sale. Order reversed, as “order of sale improvidently granted.” (p. 203.) At page 202 the Court said:

“However, this rule does not apply to the enforcement of liens not invalidated or voided by the Bank-

ruptcy Act, for the enforcement of foreclosure, for which proceedings in the State court have been instituted prior to the commencement of proceedings in bankruptcy, either within or before the four months' period, where the *State court has first acquired actual or constructive possession of the property.* (Italics ours.) (Stratton v. New, 283 U. S. 318, 332, 51 S. Ct. 465, 75 L. Ed. 1060; Davis v. Friedhuber, 104 U. S. 570, 26 L. Ed. 818.)”

III.

Both Appellant and Appellees Are and Were at All Times Involved in These Proceedings Residents and Citizens of the State of California [Tr. pp. 2, 12] and Therefore the Federal Court Would Not Even in a Plenary Proceeding Have Jurisdiction to Determine Appellant's Adverse Claim to the Res.

“If the averment of the appellants that they were in possession adverse to the trustee is based upon a substantial claim, not merely colorable, the court had not jurisdiction to adjudicate title in a summary proceeding, *nor in any proceeding, since the parties are not of diverse citizenship and appellants have not given their consent thereto.*” (Italics ours.)

In re Cadillac Brewing Co., 102 Fed. (2d) 369, 370.

“An adverse claimant who appears before the referee and sets up his adverse claim, as an objection to the hearing on the merits, shows thereby his objection to the jurisdiction to hear as to title.”

Louisville Trust Co. v. Comingor, 184 U. S. 18.

IV.

Appellant's Action in the State Court Was Primarily One for Injunction to Restrain Continuing Trespass and to Quiet Title, and Incidentally for Damages and Costs, and Should Not Be Restrained.

Prosecution of an action of trespass in a State court will not be stayed by Bankruptcy Court.

In re Franks, 49 Fed. (2d) 389;

In re Gumbransky, 8 Fed. Supp. 601.

Such an action is a defensive action, one to protect one's own property from invasion and injury by another. This is the particular action which the law gives to the citizen, to take the place of the shot-gun and rifle, which were employed at one time to protect property and private rights—and particularly line fences, ditches and pipe lines carrying water. But this restraining order issued by the Bankruptcy Court, of which appellant complains, ties her hands and prevents her from proceeding with her suit in the State court, to protect her property.

V.

**The Rule of Comity Is Deeply Imbedded in Our Law
and Has Universal Recognition.**

In the recent case of *Warder v. Brady*, 115 F. (2d) 89 (C. C. A. 4th Cir.), it was held (p. 92):

(1) That money or property held adversely to the bankrupt can only be recovered in a plenary suit, and not by a summary proceeding in bankruptcy.

(2) That if the adverse claim be substantial and the property is in the possession of claimant, the court is without jurisdiction to proceed at all, even in a plenary action, without the consent of the defendant. (Citing many cases.)

(3) That another restriction upon the jurisdiction of the Bankruptcy Court is the rule of comity, which forbids one court from seeking control over the property of the debtor which is already the subject of proceedings in another court, and permits the court first acquiring possession of the property to continue its administration without interruption, until it is complete, and stating that "this principle has complete recognition in this and other federal courts." (Page 92.)

"The filing of petitioner's proceedings in bankruptcy on August 10, 1934, did not oust the Superior Court of Shasta County of jurisdiction to try and determine the rights of the litigants in the possessory action of ejectment which was pending in that court for more than a year prior to filing of Joerger's petition in bankruptcy." . . . "The United States Dis-

strict Court has specifically authorized the Superior Court of Shasta County to proceed with the trial of the ejectment case.”

Joerger v. Superior Court, 2 Cal. App. (2d) 360, 365.

Jurisdiction of State court not suspended in equity to correct mistake in contract.

Strauss v. Bruce, 139 Cal. App. 62, 66;

Zartman v. First Nat'l Bank, 216 U. S. 134.

“When the state court assumes jurisdiction in a case in which it can completely determine the rights of the parties without interfering with the jurisdiction of the federal court, a plea of the pendency of bankruptcy is of no avail. Thus the court may settle property rights where it is alleged that the property involved never belonged to the bankrupt or to his estate, and therefore never passed to the trustee.”

Ramey v. McCoy, 193 S. E. (Ga.) 790;

4 Cal. Jur. 69.

To the same effect is:

Collier on Bankruptcy, 12th Ed., p. 554;

Heffner v. Jackson, 95 Cal. App. 476, 480.

VI.

**Sub-paragraph (o) of Section 75 of Bankruptcy Act
Has Application Only to Property of Bankrupt,
and No Application to the Property of a Third
Person.**

In the case of *Tullis v. Pratt et al.* (Utah), 42 Pac. (2d) 222, 224, Chief Justice Hansen said:

“The provisions of the Bankruptcy Act, relied upon by plaintiff, were not intended to protect one who is unlawfully in the possession of the property of another. Section 75, subdivision (n) of the Act, 11 U.S.C.A., Par. 203 (n), provides that ‘the filing of a petition pleading for relief under this section shall subject the farmer and his property, wherever located, to the exclusive jurisdiction of the court.’ If at the time complained of, the plaintiff was wholly without right in or to the premises in question, obviously the Federal District Court could acquire no jurisdiction, exclusive or otherwise, over property or property rights which had no existence.”

Does appellant’s action against appellees in the State court fall under any of the subdivisions 1-6 of paragraph (o)? As such action is one to restrain trespass, to quiet title and for damages and costs, it obviously could not come under 2, 3, 4, 5 or 6, and if at all would come under 1, which reads: “Proceedings for any demand, debt, or account, including any money demand.”

For definition of “debt,” see:

Electric Production Co. v. Lewellyn, C. C. A. (Pa.), 11 Fed. (2d) 493, 494.

“Account” is defined in *Donley v. Bailey*, 110 Pac. 65, 68 (48 Colo. 373), and “demand” as fixing jurisdiction, relates to money demands.

Harlis v. Becker, 24 Cal. App. (2d) 130.

The use of these terms, “demand, debt or account” indicates that they are of the one class, and the words following, “and including any money demand,” refers to the same thing and in a sense is tautological.

Wherefore, appellant respectfully suggests that an order be made herein reversing that part and portion of the order and judgment made by the District Court, December 10, 1941, from which this appeal is taken, with costs, and that the District Court be directed to enter an order granting appellant’s petition to proceed with the trial and termination of the action now pending in the Superior Court of California, in and for the County of Los Angeles, wherein appellant is plaintiff and appellees are defendants.

Respectfully submitted,

JAMES P. CLARK,

Attorney for Appellant.

No. 10052

IN THE

21
United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MYRTLE D. A. PECK,

Appellant,

vs.

FRANCES HOWARD and FRED HOWARD,

Appellees.

APPELLEES' BRIEF.

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FILED

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No. 10052

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MYRTLE D. A. PECK,

Appellant,

vs.

FRANCES HOWARD and FRED HOWARD,

Appellees.

APPELLEES' BRIEF.

Statement of Pleadings and Jurisdiction.

On May 26, 1941, appellees filed their petition in the United States District Court under Sec. 75 of the Bankruptcy Act, seeking a composition or an extension of time to pay debts, and other relief under said Act. [Tr. pp. 2-5.]

On November 6, 1941, application for confirmation was filed in the District Court. [Tr. pp. 7-9.] Conciliation Commissioner's certificate dated October 22, 1941, was filed in the District Court on November 6, 1941. [Tr. pp. 9-10.] Notice of motion to confirm was filed on November 6, 1941. [Tr. p. 11.] Hearing on motion to confirm was set for November 24, 1941. [Tr. p. 11.]

November 18, 1941, affidavit of Paul Leiter was filed in the District Court, setting out time of first meeting of creditors, consent of majority in number of creditors to a composition, and filing by appellees of application for confirmation of composition on or about November 9, 1941. (This was typographical error; record shows filing was on November 6, 1941.) Order of Court waiving three month period required under Rule 50 of the Supreme Court filed. [Tr. p. 25.]

On November 17, 1941, appellant filed her petition for leave to proceed with an action commenced in the Superior Court of the State of California, affecting certain property rights owned, and in the possession of appellee farmers. [Tr. pp. 12-17.] Prayer was for order to issue against appellees and their attorney to show cause on November 24, 1941, why order should not be made granting appellant the right to proceed in the State Court. [Tr. p. 18.]

An order to show cause issued, requiring appellees and their attorney to show cause why leave to proceed in State Court should not be granted, which ordered that service be made on debtors and their attorney not less than three days prior to date of hearing. [Tr. p. 20.] (Would that mean personal service?) No personal service was had on appellees, or any service whatsoever, prior to the hearing on the order to show cause. [Tr. p. 21.] Appellees knew nothing of hearing and could not interpose answer to the petition, as her attorney could not locate them in time. [Tr. pp. 49-50.]

Appellant's petition for leave to proceed in State Court, came on for hearing [Tr. p. 26]; Court made its order continuing the automatic stay imposed, upon filing of the petition under Section 75, *without prejudice to the assertion of the rights set forth in the petition* of appellant, and referred the petition to the Conciliation Commissioner with plenary power and with authority to proceed to hear and determine the issues presented by said petition, subject to review by the District Court. [Tr. pp. 31-32.]

On January 8, 1942, notice of appeal from portions of order and judgment was filed in District Court [Tr. p. 33], and undertaking for costs on appeal approved and filed. [Tr. pp. 34-36.] On January 17, 1942, designation by appellant of points on which she intended to rely on appeal, was served and filed. [Tr. pp. 37-41.] On same date designation by appellant of papers and matters to be included in record on appeal was served and filed. [Tr. pp. 37-41.] On same date designation by appellant of papers and matters to be included in record on appeal was served and filed [Tr. pp. 41-43]; certificate of clerk of District Court. [Tr. pp. 43-44.]

Reporter's transcript [Tr. pp. 45-70]; transcript of record filed with clerk of this Court February 16, 1942. [Tr. pp. 71-72.] Appeal taken under Section 24a of the Bankruptcy Laws as amended in 1938 and 1939; also within the time fixed by Section 25.

Questions Involved.

1. DID THE COURT ERR IN DENYING PRAYER OF APPELLANT'S PETITION AND CONTINUING THE RESTRAINT AUTOMATICALLY IMPOSED BY THE FILING UNDER SEC. 75; AND REFERRING SAID PETITION TO THE CONCILIATION COMMISSIONER, WITH PLENARY POWER AND AUTHORITY TO PROCEED TO HEAR AND DETERMINE THE ISSUES PRESENTED BY SAID PETITION, SUBJECT TO REVIEW?

2. DID APPELLANT COMPLY WITH REQUIREMENTS OF SEC. 75 (o) WHICH REQUIRES HEARING AND REPORT BY CONCILIATION COMMISSIONER, BEFORE PROCEEDING FURTHER WITH ACTION IN STATE COURT?

3. DOES APPELLEES' CLAIM TO OWNERSHIP AND RIGHT TO USE WATER FOR FARM AND DOMESTIC PURPOSES COME WITHIN MEANING OF "PROPERTY", WITHIN THE MEANING OF SUBDIVISIONS 1-6, SUBPARAGRAPHS (o)?

Statement of Case.

Appellees are the owners of and in possession of 40 acres of land, on which they raise turkeys, chickens, and grow fruit trees and vegetables for family consumption [Tr. p. 3], together with the possession of and right to use all water necessary for domestic as well as agricultural purposes, from a certain pipe line running across their land, which carries water from certain springs. [Tr. pp. 14-15.] Appellees filed petition under Sec. 75 of the Bankruptcy Act, secured consent of creditors to offer of composition and filed application with the District Court for confirmation. [Tr. p. 11.] On November 24, 1941, appellant asked leave of Court to proceed with the trial instituted in the State Court of her suit to quiet title to the use of water flowing in a pipe line, claimed by, and in possession of appellees, to recover money damages suffered by reason of appellees' use, possession and claim of ownership, and for injunction, to restrain appellees from further using, owning, possessing, or exercising use, ownership or possession of said water right, on the grounds that said suit was instituted in the State Court prior to the filing of appellees' petition under Sec. 75 of the Bankruptcy Act, and that leave should be granted appellant to continue with the completion of the State Court action.

Appellees were not served with a copy of said petition [Tr. p. 48], hence knew nothing of the petition, and no answer thereto was filed. A denial of all facts alleged in

the petition were made and entered orally. [Tr. p. 65.] During the trial of the action in the State Court, *but before judgment*, appellees filed under Sec. 75 of the Bankruptcy Act. Paul Leiter, their attorney, appeared in the State Court and notified it to that effect. Thereupon the Court advised Mr. Clark, attorney for appellant, to check into the law, to see if there were any means of securing a transfer back to the State Court for trial, and that he would continue the matter from time to time, in his court, in order to make certain that if and when it was sent back to the State Court, he would hear the case. He also told Mr. Clark that if it took a day, if it took a month, if it took a year, he wanted to hear the matter, and that he would not only render judgment for appellant, but would permit Mr. Clark, the attorney for appellant, the right to amend her complaint to ask for more damages, and that he would allow more money damages. [Tr. p. 66.] This was one of the reasons the Court refused to exercise its discretion to permit the State Court to try the matter. [Tr. pp. 60-61.]

ARGUMENT.

I.

The Court Did Not Err in Denying Prayer of Appellant's Petition and Continuing in Force the Automatic Restraint; Referring Said Petition to Conciliation Commissioner With Plenary Power and With Authority to Proceed to Hear and Determine the Issues Presented by Said Petition.

A. EXCLUSIVE JURISDICTION OF APPELLEES AND THEIR PROPERTY IS IN THE BANKRUPTCY COURT.

Sec. 75 (11 U. S. C. A. Sec. 203) (n) provides:

"The filing of a petition . . . shall immediately *subject the farmer and all his property wherever located, for all purposes of this section to the exclusive jurisdiction of the court . . .*" (Italics ours.)

Sec. 75, Sub. (o) of the Bankruptcy Act, amended August 28, 1935, provides:

"Except upon petition made to and granted by the judge *after hearing and report by the conciliation commissioner*, the following proceedings . . . if instituted at any time prior to the filing of a petition under this section shall not be maintained in any court or otherwise." (Italics ours.)

The case of *Security-First National Bank of L. A. v. Superior Court in and for Imperial County*, 12 Cal. App. (2d) 140 (1936), held:

"*The Federal Court has exclusive jurisdiction of person and property of one petitioning for agricul-*

tural composition under this section *until such proceedings is terminated.*" (Italics ours.)

To same effect:

In re Duffy, Ill., 1934, 9 F. Supp. 166;

In re O'Brien, C. C. A., C. Y., 1935, 78 F. (2d) 715;

In re Brown, D. C. Iowa, 1938, 21 F. Supp. 935.

The case of *In re Brown, supra*, answers the argument raised in appellant's brief as to jurisdiction. Debtor (Brown) filed petition under 75 Bankruptcy Act; Lena (wife) moved to dismiss on grounds a divorce action was instituted by her in State Court prior to 75 proceeding and that on the same day the State Court granted her judgment in divorce and gave title to the farm to her, debtor filed under Section 75 of the Bankruptcy Act.

The wife contended divorce decree was in force prior to institution of 75 proceedings in the District Court, and that Court was without jurisdiction over the property. Debtor contended his petition under Section 75, filed after decree rendered, was, nevertheless prior to entry in judgment book of said judgment. The Court held:

"It is not necessary to determine question whether State Court granting wife property before filing by debtor, would divest Federal Court of jurisdiction. The record shows debtor still has some property right in and to the real property as he is in possession of the land." (Italics ours.)

And, further in the same case, the Court stated:

"Questions as to ownership, title and the like, are of relatively small importance in these proceedings, if

they are instituted in good faith for a composition proposal, as the act itself is very definite that immediately upon filing petition in bankruptcy court, jurisdiction over that property immediately vests in this court and no further proceedings can be had by any other court, state or federal, pending the determination of the question of whether debtor can offer a composition proposal that would be acceptable and not interfere with vested and constitutional rights of creditors and secure the requisite number and amount of creditors to approve same.”

Section 75, Bankruptcy Act (p), reads:

“The prohibitions of sub. (o) shall apply to all *judicial proceedings in any court . . .* and shall apply . . . *to all of debtor’s property*, wherever located. *All such property shall be under the sole jurisdiction and control of the court in bankruptcy.*” (Italics ours.)

And it was held in *In re Walsh*, 18 F. Supp. 762, that:

“The sale of debtor’s real property under judgment recovered more than four months prior to the filing of a petition for composition under sec. 75, was held enjoinable by the bankruptcy court.”

And in the case of *In re Bradford*, 77 F. (2d) 992, the Court said:

“Where Congress has lawfully vested Federal Courts with power to assume exclusive jurisdiction over given controversies, jurisdiction of state courts must yield to that of federal courts wherever exercised.”

Kalb v. Feuerstein, 60 S. Ct. 343, 308 U. S. 433, decided January 2, 1940, settles the question of jurisdiction in so far as hearings on Frazier Laemke proceedings are concerned. Mr. Justice Black, delivering the opinion of the Supreme Court, said:

“Appellants are farmers. Appellees, as mortgagees, foreclosed property and bought in at the sale. Appellant filed under Sec. 75 before sale was confirmed by State Court, and while under said section, the State Court confirmed the sale previously held. No stay was sought from the bankruptcy court or from the state court. Mortgagor (debtor) claimed Sec. 75 was self-executing, that is, ‘that it requires no application to the state or federal court in which foreclosure proceedings are pending for a stay’: in other words, *that it provides for a statutory and not for a judicial stay.*” (Italics ours.)

The State Court decided the statute did not itself as an automatic statutory stay terminate the State Court’s jurisdiction when the farmer filed his petition in the bankruptcy court. The Supreme Court held:

“It is generally true that a judgment by a court of competent jurisdiction bears a presumption of regularity and is thereafter not subject to collateral attack. But Congress because its powers over the subject of bankruptcy is plenary, may, by specific bankruptcy legislation create an exception to that principle and render judicial acts taken with respect to the person or property of a debtor whom the bankruptcy law protects nullities and vulnerable collaterally.

“The states cannot, in the exercise of control over local laws and practice, vest State Courts with power to violate the Supreme law of the land. The con-

stitution grants Congress exclusive power to regulate bankruptcy and under this power Congress can limit the jurisdiction which courts, state or Federal can exercise over the person and property of a debtor who duly invokes the bankruptcy law. If Congress has vested in the bankruptcy courts exclusive jurisdiction over farmer debtors and their property, and has by its act withdrawn from all other courts all power under any circumstances to maintain and enforce foreclosure proceedings against them, its Act is the Supreme law of the land, which all courts, state and federal, must observe. The wisdom and desirability of an automatic statutory ouster of jurisdiction of all except bankruptcy courts over farmer-debtors and their property were considerations for Congress alone."

The Court gives an exhaustive explanation of (n), (o), and (p) of the Act as well as what was the intent of Congress, and the purpose as set out in the House Judiciary Committee's Report, and then concludes with the following:

"Because that State court had been deprived of all jurisdiction or power to proceed with the foreclosure, the confirmation of the sale, the execution of . . . a deed . . . assistance . . . ejectment of appellants from their property, were all without authority of law . . . Congress manifested its intention that the issue of jurisdiction in the foreclosing court need not be contested or even raised by the distressed farmer . . . and considerations as to whether the issue of jurisdiction was actually contested in the County court, or whether it would have been contested, are not applicable where the plenary power of Congress over bankruptcy has been exercised as in this act."

B. THE CONCILIATION COMMISSIONER HAS THE RIGHT TO ACT AS THE COURT IN THE FIRST INSTANCE.

A conciliation commissioner, to whom a petition by a farmer for a composition or extension is referred, has authority prior to an adjudication of bankruptcy to act as the court, in the first instance and subject to review, in controlling the property of the debtor in the best interests of the farmer and his creditors.

Adair v. Bank of America (Calif.), 303 U. S. 350.

Section 75 of the Bankruptcy Act provides opportunities for the rehabilitation of farmers. In order to further carry out the provisions of Sec. 75, the statute provides in Subsections (e) and (n) for the exercise by the Court of "such control over the property of the farmer as the Court deems in the best interests of the farmer and creditor." Subsection (a) provides the bankruptcy court may appoint one or more *referees to be known as conciliation commissioners*.

Subsections (a)-(r) inclusive, make provisions for conciliation commissioners, set up the same qualifications as are required for eligibility to the office of referee, authorize the conciliation commissioner to receive and transmit the petitions, call the first meetings of creditors, supervise the farmer's affairs and do any thing and matter in the administration of the debtor's estate the same as any referee could do in any bankruptcy proceeding.

In fact, Subsection (a) specifically states the conciliation commissioner is in reality a *referee* with another title, *i. e.*, “every court of bankruptcy . . . shall appoint *one or more referees* to be known as conciliation commissioners”

In accordance with Subsection (b), the United States Supreme Court on April 24, 1933 established Rule L to govern proceedings under Section 75 (a)-(r) inclusive, as an addition to the general orders in bankruptcy.

Subsection 11 of Rule L provides:

“Insofar as is consistent with the provisions of section 75 and of this general order, the Conciliation Commissioner *shall have all the powers and duties of a referee in bankruptcy and the general orders in bankruptcy shall apply to all proceedings under said section.*” (Italics ours.)

Adair v. Bank of America, supra, Mr. Justice Reed, writing the opinion for the Court said, in part:

“The Commissioner was given insofar as is consistent with the Section 75 and Rule L ‘*all the powers and duties of a referee in bankruptcy*’, to be carried out under the General Orders in Bankruptcy.

Sections 38 and 39 of the Bankruptcy Act and subsections 3 and 6 of Rule L indicate the wide extent of the authority of the conciliation commissioner.”

Section 38 of the Bankruptcy Act provides:

“*Jurisdiction of Referees.* Referees respectively are hereby invested, subject always to a review by

the judge, to (1) *consider all petitions referred to them . . . (4) perform such part of the duties except as to questions arising out of the applications of bankrupts for compositions or discharges as are by this act conferred on courts of bankruptcy, and we shall be prescribed by rules or orders of the courts of bankruptcy.*"

Sec. 39 of the Bankruptcy Act specifies the duties of a referee as follows:

"Referees shall (1) . . . (5) *make up records embodying the evidence.*"

The conciliation commissioner has authority prior to adjudication under 75 (s) *to act as the Court* in the first instance and subject to review in controlling the property in the best interests of the debtor and his creditors. *The conciliation commissioner, like the referee, exercises some of the "judicial authority" of the bankruptcy court.*

In re Weidmer, 82 F. (2d) 566;

Adair v. Bank of America, *supra*;

White v. Schloer, 178 U. S. 542, 546;

Mueller v. Nugent, 184 U. S. 1, 13.

Under General Order 50, a conciliation commissioner has the same powers and duties as a referee in bankruptcy except where there is a conflict with provisions of the act or the order.

In re Miller, 111 F. (2d) 28, decided 1940, conforming to mandate *Miller v. Hatfield*, 1940, 60 S. Ct. 102, 309 U. S. 1.

To same effect:

Donald v. Bankers Life Co., 107 F. (2d) 810;

In re Brill, D. C. Cal., 1939, 28 F. Supp. 304.

If the petition of appellant had been filed with the conciliation commissioner in the first instance he would have the power and jurisdiction to adjudicate the matters therein contained. In addition to the authorities hereinbefore cited, we have a reference by the District Court judge, who is the presiding officer of the court of bankruptcy, referring the matter to the conciliation commissioner with plenary power to hear and determine the matter contained in the petition; appellant cannot question the right of a judge of the District Court referring a bankruptcy matter to a referee, instead of hearing it *ab initio*. *Donald v. Bankers Life, supra*, decided in 1939, is interesting on this point. It is there said:

“The fact that section designates the conciliation commissioner as referee before whom estate in farmer debtor proceeding will be administered if administration becomes necessary, neither invests the conciliation commissioner with any greater authority than is conferred upon the court nor takes from the judge the primary control over the proceedings vested in him as its presiding officer.”

II.

Appellant Did Not Comply With the Requirements of Section 75 of the Bankruptcy Act (o) Which Requires Hearing and Report by Conciliation Commissioner, Before Proceeding Further With Action.

Appellant in her brief, page 10, cites the case of *In re Wogstad*, 10 F. Supp. 349. The following appears on page 351:

“Even if court determines respondent is entitled to the rights he asserts, the court cannot do anything until after the report of the commissioner. This construction would seem to be the only way in which effect can be given to all provisions of 203 of the Bankruptcy Act.”

Inasmuch as it is a District Court of Wyoming case, the interpretation of the section is not entitled to any greater weight than the interpretation placed upon it by our Court.

A different situation is presented in the *McFarland* case, 112 F. (2d) 349, cited by the appellant. It seems to the writer that the learned trial court in analyzing the decision of this Court correctly stated the law of the case to be that the phrase “except upon petition made and granted after hearing and report by conciliation commissioner” referred to a “hearing and report” on the matter contained in the petition, rather than meaning “after hearing and report of composition and acceptance of composition”. [Tr. pp. 52-57.] We ask the Court’s indulgence to permit us to adopt the lower court’s analysis of the *McFarland* case, as our analysis.

In the *McFarland* case there was no objection urged by anyone to the court making the order that

it made, while in the case at bar, there is an objection made, and therefore the question of jurisdiction was properly decided, that it had power to make the order. Judge Wilbur throws a good deal of light on the problem in his concurring opinion, wherein he cites the case of *Union Joint Stock Land Bank v. Byerly*. Judge Wilbur says he concurs in the conclusion reached. I believe, however, that the phrase in sub. (o) of Sec. 75, quoted in the main opinion refers to a hearing and report by the conciliation commissioner upon the petition for leave to enforce a lien upon the property of the farmer.

The lower court held, that under the *McFarland* case, the proper method, if petition is properly filed under Sec. 75 a-r, is to divest the State Court, or any other court of authority over the res and transfer it to the court of the conciliation commissioner and that all matters are to be adjudicated and determined in that forum, subject to review by the judge of the court. That was the view I suggested I thought would be the proper course to take, and I think that view is strengthened by Judge Wilbur's concurring opinion. [Tr. p. 53.]

"The only point before this Court in the *McFarland* case was the question as to whether or not the lower court had erred in assuming jurisdiction to make the order which it did, permitting the sale. The record shows they all acquiesced in the hearing, shows there was no dissent and no objection to the procedure. The only question was one of jurisdiction, whether the Court had power to do it under the statute. That was the question decided." Are not the reasons set out by the majority judges in reaching their decision pure dicta? Should not as much weight be given to the concurring judge's reasons as to

those of the majority judges. "THERE IS NO DISSENT" TO THE DECISION. The Honorable Justices of this Court "agree the judgment should be affirmed that the Court had jurisdiction to do what it did. In analyzing the case, Judge Wilbur says he does not agree with his associates that the power of the Court was the action of the judge. He says the Court had a greater power than that if it sought to exercise, which it did not seek to exercise in the *McFarland* case. 'As stated in the main opinion, the appellant consented to a hearing of the application by the Court before the hearing on the confirmation of the proposal for composition and extension. Appellant did not object to the hearing of the application of the appellee for leave to sell upon the ground that a prior hearing before the conciliation commissioner was necessary.' " The entire court acquiesced. "There was no affirmative opposition interposed by anyone in the lower court to what it was doing but they questioned the power of the court to do anything at all." It is because of that situation that "Judge Wilbur says: 'Not having made the point in the court below he cannot make it in this court.' "

"Under the *McFarland* decision, appellant bases her right to demand the lower court grant leave to proceed to hear and determine the matter in the State Court. If that is what the decision says, then as a corollary it has the right to say that instead of proceeding in State Court, we will proceed in this Court, particularly since conciliation commissioner's certificate says there is in dispute, in abeyance, the determination of a right of way over this property for pipe line purposes."

III.

Appellees' Claim to Ownership and Right to Use
Water Is Property Within the Purview of Sub-
divisions 1-6 of Section 75, Sub. (o).

In the case of *Hoyd v. City Bank of Albany Co.*, 89 F. (2d) 105, the Court was called upon to determine what was meant by the use of the term "property" as that word was used in Section 75 (n) and (o), and said, at bottom of page 107:

"The term property is not defined in the enactment. It is unlimited by any qualifying phrase and doubtless was used in its ordinary sense as interpreted in the various decisions of the Federal and State courts. Property is a nomen generalissimum and extends to every species of valuable right and interest including real and personal property, easements, franchises, and other incorporeal hereditaments."

And the case of *In re Brown*, *supra*, cited as authority under Point I of appellees' brief, quotes from the *Hoyd* case and adopts the interpretation of property as used therein in its opinion.

The case of *Lucas v. Schneider*, 47 F. (2d) 1006, at page 1008, defines property as follows:

"The term 'property' standing alone includes everything that is the subject of ownership. It is a nomen generalisimum, extending to every species of valuable right and interest. *Scranton v. Wheeler*, 179 U. S. 141, 170."

Appellees' use and possession for domestic and farming purposes of the water flowing through the pipe over their land, is an incorporeal hereditament; that being so,

it is within the purview of the authorities cited under this point.

Appellant contends the State Court action is for trespass, and not under Sub. (o)'s inhibitions. She has admitted in [Tr. p. 37] her brief and transcript the action is for quieting title, and trespass. Under the authorities herein, it is difficult to imagine appellant's action not within Sub. (o).

IV.

Appellant's Points and Authorities Are Contrary to the Evidence and the Facts of the Case.

We shall answer the points in appellant's argument in the same order that she presents them in her brief. Thus we believe we will facilitate the consideration of this case by this Court. A lengthy reply is not necessary. The issues raised and determined, in the lower court are clear.

V.

Reply to Appellant's Argument, Point I, Page 10 of Her Brief. The Cases Cited by Appellant Are Authority for Appellees.

Under this point appellant maintains that the cases of *In re Wogstad* and *McFarland v. West Coast Life Ins. Co.*, both cited *supra*, are authorities for her position that the hearing and report by conciliation commissioner means the hearing and report of creditors' claim and hearing on extension. We adopt the argument and authorities presented under Point III of our brief in answer to this point of appellant's brief.

VI.

Reply to Appellant's Argument, Point II, Page 12 of Her Brief. Under This Point, Appellant Fails to Distinguish Between the Authorities in Support of General Bankruptcy Law and the Special Act of Bankruptcy Known as Frazier Laemke Proceedings.

Appellant's cases, cited under this point, do not aid her. The case of *Harrison v. Chamberlain*, 271 U. S. 191, cited by appellant, does not apply. In that case, the *bankruptcy trustee filed a petition for summary order requiring Mrs. Chamberlain, a stranger to the proceeding, to deliver up to him certain money in her possession, which he claimed she held fraudulently from the bankrupt.* Our case is entirely different, in that the so-called adverse claimant (appellant) admits appellees are using the water, and are in possession, of the water on their own land, and claim ownership in and to the right to use the water. That the State Court proceeding is one to enjoin the trespass, quiet her title and recover money damages. (App. Br. p. 20.) The law enunciated, is in our favor. The Court there said:

“HOWEVER, *the court is not ousted of its jurisdiction by the mere assertion of an adverse claim; but having power in the first instance to determine whether it has jurisdiction to proceed, the court may enter upon a preliminary inquiry to determine whether the adverse claim is real and substantial or merely colorable. If found merely colorable the court may then proceed to adjudicate the merits sum-*

marily; if found to be real, and substantial, it must decline to determine the merits and dismiss the summary proceedings."

That is our position, precisely. The lower court said: "Our minds are not together, Mr. Clark. I am not prepared to dispute the verity of what you say. I am talking about a forum to try the issues. You are talking about the merits of an issue." [Tr. pp. 61-62.] "I am referring petition of Peck to conciliation commissioner with plenary powers . . ." [Tr. p. 69.]

We have heretofore cited authorities showing the conciliation commissioner has authority to hear and determine the matter contained in said petition. The *Harrison* case cited by appellant is authority that appellant's assertion in her petition that she is an adverse claimant does not oust the Court of jurisdiction and we again reiterate that the appeal is premature; it should not have been taken until after the hearing and report by conciliation commissioner.

Appellant next cites, and lays great stress on the case of *Louisville v. Cominger*, 184 U. S. 413, as sustaining her position. In that case the referee *entered an order against adverse claimant without notice to adverse claimant*. The referee on his own motion made an order requiring Cominger to show cause why he should not pay over money in his possession. At that time *money was in Cominger's possession, and Cominger claimed adversely to bankrupt*. The referee and judge both passed upon

Cominger's claim as being adverse to bankrupt estate. Under these facts, the law quoted by appellant on top of page 13 of her brief, is authority. But the remainder of the legal holdings enunciated in that case favor appellees. The case cites, with approval, *Mueller v. Nugent*, 184 U. S. 1, and says:

“The district court has power to ascertain whether in the particular instance the claim asserted is an adverse claim existing at the time petition was filed. And according to the conclusion reached, the court will retain jurisdiction or decline to adjudicate the merits.”

Is this not what the lower court did in the case at bar? It endeavored to ascertain whether in the particular instance the claim of appellant was adverse, but this appeal was taken, before this could be done.

Appellant quotes at great length from *Dannell v. Wilson-Wierner-Wilkinson*, 109 F. (2d) 364, which case cites with approval a well discussed case, *Straton v. New*, 283 U. S. 318. Appellant also quotes from the *New* case, which cites with approval a decision by this Circuit, the case of *In re Maier Brewing Co.*, 65 F. (2d) 673. These cases are all similar to each other, and all cited in support of appellant's argument Point II.

We will not differentiate these cases from the case at bar, other than to *cite authorities specifically overruling Straton v. New, supra*, and all similar cases, in so far as Frazier Laemke proceedings, and appellees' petition is concerned.

In *Hoyd v. City Bank of Albany Co.* (C. C. A. 6th), decided March, 1937, which was a Frazier Laemke proceeding, reported in 89 F. (2d) 105, the Court said, at page 108:

“As to Appellees’ contention that the state court has exclusive jurisdiction of the foreclosure proceedings, *we do not consider that Straton v. New*, 283 U. S. 318 and similar decisions are here controlling. It cannot be doubted that the congress when acting within its valid legislative powers has power under the bankruptcy clause of Article 1, Sec. 8, U. S. Constitution, to stay proceedings instituted at any time prior to the filing of the petition under this section (11 U. S. C. A. Sec. 203(o)) it governs the foreclosure proceedings in the instant case.” (Italics ours.)

The case of *Kalb v. Feurstein*, cited *supra* under Point I-A, and briefed at great length, substantiates and follows the holding laid down in the *Hoyd* case, and by its holding, overrules the *Straton v. New* and similar decisions. It appearing that the remainder of the authorities cited in appellant’s brief from page 15 to and including page 16, where Point III is set out in appellant’s brief are similar to, and based upon *Straton v. New*, they too are overruled and do not affect appellees’ position.

VII.

Reply to Appellant's Argument, Point III, Page 16
of Her Brief.

Under this point, appellant cites *In re Cadillac Brewing Co.*, 102 F. (2d) 369, and *Louisville v. Cominger*, 184 U. S. 18. These cases were discussed by appellees in Point VI of their brief, and the cases cited therein by appellees to that point, dispose of the question raised by appellant in favor of appellees.

VIII.

Reply to Appellant's Argument, Point IV, Page 17
of Her Brief. Under This Point Appellant Admits the Jurisdiction Is in the Bankruptcy Court.

Under this point, appellant contends that since her action in the State Court, which was stayed by the bankruptcy court, was one to quiet title for money damages, and to enjoin trespass that a bankruptcy court will not stay a State Court, and cites *In re Franks* and *In re Gumbrowsky*.

By admitting she is attempting to quiet title to the water right, she recognizes appellees as claiming ownership (which she is endeavoring to show is inferior to her title). By admitting she seeks to restrain appellees' use of the water, she admits they are in possession of the water and using it.

We do not believe we need go further to show jurisdiction is in the Federal Court under the holdings of *Kalb v. Feurstein, supra*, *Hoyd v. City Bank, supra*, and the cases cited under argument, Points I, I-A, and I-B of appellees' brief.

IX.

Reply to Appellant's Argument, Point V, Page 18 of Her Brief.

We can dispose of appellant's argument under this heading by citing all cases under argument, Points I, I-A, and I-B of appellees' brief.

X.

Reply to Appellant's Argument, Point VI, Page 20 of Her Brief.

We have no quarrel with law as laid down in *Tullis v. Pratt*, cited by appellant under this point. The evidence conclusively shows, from the record, as well as by appellant's own admissions in her brief (Brief p. 17) that we are in possession of the water right, and using it.

Appellant asks the question whether or not her suit against appellees in the State Court falls under any of the Subdivisions 1-6 of Sub. (o). Appellant admits her action is one to restrain trespass, quiet title, and for money damages. This question can be readily answered in the affirmative, under the authorities heretofore cited in our argument, Point III of appellees' brief.

Conclusion.

The issues involved in this appeal are not at all difficult of solution. The case is clearly one in which appellant seeks to establish her status as an adverse claimant, without first permitting inquiry to be made to determine if she is an adverse claimant, and then proceeds on the happy solution that by stating in a petition that she is an adverse claimant, has the right to proceed in the State Court on the theory the Court has no jurisdiction to try the matter in a summary proceedings nor in a plenary suit, without her consent.

Appellant overlooks one requirement, necessary to sustain her position. That is "possession of the res".

In re Logan, 196 F. 678, the Court says:

"The bankrupt may be compelled summarily to deliver to the trustee of his estate property which such bankrupt owns and owned at the time of the adjudication, *and has in possession and the title to which, with the right of possession passes to the trustee on his appointment by operation of law.*"

In Mound Mines Co. v. Hawthorne, 173 Fed. 882, the Court held:

"When a third party has record title by deed from a fourth party to real property which belongs to the trustee (bankrupt and trustee both being in possession) the court or referee may make an order in a summary proceeding and without resort to plenary action to compel the execution and delivery of a deed by such third person when the real estate has come into the actual possession of the trustee."

“The test of jurisdiction to proceed by summary proceeding to determine controversies in regard to real or personal property is possession of property in or by the bankrupt at time of filing petition. Property comes within jurisdiction of Bankruptcy court and constructively in its possession, it being in possession of the bankrupt himself.”

And in the case of *Isaacs v. Hobbs Tie and Timber Co.*, 282 U. S. 734, the Court said:

“Upon adjudication, title to bankrupt’s property vests in the trustee with actual or constructive possession and is placed in custody of the bankruptcy court. *Mueller v. Nugent*, 184 U. S. 1, 14. Title and right to possession of all property owned and possessed by the bankrupt vests in the trustee as of the date of the filing of the petition in bankruptcy. The bankruptcy court has exclusive jurisdiction to deal with property of bankrupt estate. When this jurisdiction has attached, court’s possession cannot be affected by actions brought in other courts.”

We submit to this Court that elementary principles of justice and equity invite an affirmance of that part of the order appealed from.

Respectfully submitted,

PAUL LEITER,

Attorney for Appellees.

No. 10052

IN THE

22
United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MYRTLE D. A. PECK,

Appellant,

vs.

FRANCES HOWARD and FRED HOWARD,

Appellees.

APPELLANT'S REPLY BRIEF.

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FILED

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APPELLANT'S REPLY BRIEF.

Restatement of Case as to Ownership of and Possession of Right of Way, Pipe Line and Water by Appellant.

The verified petition of appellant, which was the only evidence before the court, states that appellant was the owner of and in possession of the right of way, crossing appellees land, the pipe line on said right of way and the water flowing therethrough [Tr. pp. 12-13] and that she and her predecessors have owned and maintained said pipe line for more than forty years last past [Tr. p. 13] and also the springs supplying water for said pipe line. That at the date of the appropriation of the water in question and the completion of the pipe line July 1, 1895, the forty acres of land owned by appellees was a part of

the public domain and that by reason of the construction of the pipe line at that time Henry Hatch, a predecessor in interest of appellant acquired a vested right of way over and across the forty acres of land now owned by appellees. [Tr. pp. 13-14.] That it was not until afterwards and in December, 1895 or January, 1896 that appellees' predecessor in interest settled on the forty acres now owned by appellees and that when patent was issued September 3, 1904 it contained specific exemptions in favor of any rights for ditches carrying water and appropriation made while the same was Government land. [Tr. p. 14.] Various trespasses committed by appellees on the right of way, pipe line and water flowing therethrough are set forth, culminating in the suit by appellant against appellees October 1, 1940. [Tr. p. 15.] This was an action to enjoin appellees from such continuous trespasses, for costs and damages. [Tr. p. 16.]

A preliminary injunction was granted November 1, 1940, restraining and enjoining appellees "from the further or any use of the waters belonging to appellant and flowing through said pipe line", except for household use and a reasonable amount to sprinkle the lawn at the house belonging to appellees. [Tr. p. 16.]

This restraining order to be in effect pending the trial of said action. [Tr. p. 16.] Then follows the statement of the other matters contained in appellant's petition.

Erroneous Claims and Over Statements in Appellees' Brief.

(a) Under the head "Statement of Case", page 5 of their brief, after stating ownership and possession of their 40 acres of land and its use in raising turkeys, chickens, etc., say

"together with the possession of, and right to use all water necessary for domestic as well as agricultural purposes, from a certain pipe line running across their land, which carries water from certain springs [Tr. pp. 14-15]."

There is not a scintilla of evidence in the record to support this statement. The reference to the transcript made is to pages 14 and 15 of appellant's petition, and refutes instead of supporting such a claim. Appellees must have forgotten the preliminary injunction made by the Superior Court, November 1, 1940. It cannot be presumed that they are now violating it, and they certainly could not predicate any rights on such violation. The limited use allowed by the court, pending trial was permissive and clearly did not create any rights in appellees, and terminates with the trial of the action.

(b) Again at page 21 of appellees' brief they say

"our case is entirely different, in that the so-called adverse claimant (appellant) admits that appellees are using the water, and are in possession of the water on their own land, and claim ownership in and to the right to use the water."

There is no such admission and nothing in the record to support it. Certainly no such inference or presumption could flow from the nature of the action brought in the

Superior Court, which is primarily one to restrain appellees from committing trespass, and incidentally for damages and costs. It is true that plaintiff does ask to have her title quieted against appellees. An action of trespass is based more on the possession of plaintiff, than her title and the allegation of possession is an essential allegation. Appellant claims both ownership and possession, and there is no room for a presumption against her on that point. One who commits a trespass, does not thereby acquire rights in the property, unless by adverse possession for 5 years under the statute. An action to quiet title is under a claim of title and possession. So there is no presumption here. Since the statute of California was amended, one out of possession might maintain the action, where the complaint contains appropriate allegations. But here the adverse claimant (the appellant), sets out that she was the owner and in possession, and she does not by inference, presumption or otherwise admit that the appellees are in possession nor that they claim ownership.

(c) Appellees under head "Statement of Case", page 5 of their brief, states,

"Appellees were not served with a copy of said petition, hence knew nothing of the petition, and no answer thereto was filed".

And cites in support of this statement of counsel, another statement of same counsel at Tr. p. 48. This is certainly pulling oneself up by the boot straps. However, counsel is mistaken in this. The affidavit of service shows service in the manner provided by law on appellees on November 17th, 1941 by mail, and personally on their attorney on the following day. [Tr. pp. 21-22.] (*Code of Civil Procedure of California*, Sections 1012-1013.)

(d) We now come to a very twisted and distorted statement, claimed at page 6 of appellees' brief, to have been made by the Superior Court judge, when the hearing was postponed on May 26th, 1941, the day this petition in bankruptcy was filed. The judge did say that he would postpone the case from time to time and so long as it might be necessary, so that the trial of the case (which was then nearly finished) might be concluded, but he did not say "and that he not only would render judgment for appellant, etc.", and made no statement from which this could be inferred. The judge did say that if a long time elapsed before the hearing he would entertain a motion to amend the complaint, asking for additional damages, if the plaintiff (appellant) so elected. Counsel cites Tr. p. 66 in support of the statement in the brief; this is but another statement of some counsel at the hearing, but even this statement did not claim that the judge said "and he would not only render judgment for the appellant", etc. This reminds the writer of a saying of Josh Billings, "that a lot of folks know facts, that aint so". Counsel rounds out his statement on the same page of his brief with the statement: "This was one of the reasons the Court refused to exercise its discretion to permit the State Court to try the matter." [Tr. pp. 60-61.] At the pages of the transcript referred to the Court and appellant's counsel were discussing the law and there is nothing here to support the above conclusion. In fact much later in the record and at Tr. p. 66 counsel for appellees made the statement above referred to. A very improper statement, even if true, which it was not, and obviously made to create a prejudice against the trial judge in the Superior Court. We doubt that it had this effect.

ARGUMENT.

I.

Whatsoever the Exclusive Jurisdiction Conferred by Congress on the Bankruptcy Court and Control of the Bankrupt and His Property, This Does Not Give it Control of or Right to Decide the Rights of Adverse Third Parties.

On this subject we refer to the cases cited at pages 12-16 of our opening brief.

In the case of *Forest Fur Farms of America*, 122 Fed. (2d) 232, 245, the Court in deciding that the state court had jurisdiction, said:

“In considering the question of jurisdiction, we have borne in mind that ‘due regard for the rightful independence of state governments, which should actuate federal courts, require that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.’ *Shamrock Oil & Gas Corporation v. Sheets*, 61 S. Ct., 868, 872, 85 L. Ed. 1214, decided April 28, 1941; *Healy v. Ratta*, 292 U. S. 263, 54 S. Ct. 700, 78 L. Ed. 1248.”

In re Lowmon, 79 Fed. (2d) 887 (a proceeding under Sec. 75), at p. 891, the court said:

“We think there is nothing in the constitutional clause conferring on Congress the control over bankruptcy, which authorizes it to change property rights already created by the states. Under the proper exercise of that power, federal courts may be authorized to assume jurisdiction over and to administer property of the bankrupt, but they must administer that property as they find it and they have no power to create

new rights in it for the benefit of either the debtor or creditor.” (*Board of Trade of Chicago v. Johnson*, 264 U. S. 1.)

In the case of *Smith v. Chase Natl. Bank etc.*, 84 Fed. (2d) 608, Judge Sanborn at page 615, said:

“The bankruptcy act confers on the District Courts, as courts of bankruptcy, jurisdiction at law and in equity, which enable them to exercise original jurisdiction in bankruptcy proceedings. As courts of bankruptcy they are vested with power, to collect, reduce to money and distribute the estate of the bankrupt and to determine controversies in relation thereto. We think it clear that the *controversies* referred to relate to the collection sale and distribution of such estates. The jurisdiction of the District Courts, as granted by the bankruptcy act, is *unquestionably bankruptcy jurisdiction and not general jurisdiction* to hear and determine controversies between adverse third parties, which are not strictly and properly a part of the bankruptcy proceeding.” (Italics ours.)

II.

The Petition for Leave to Proceed in the State Court Did Not Call for a Reference to or Report by Conciliation Commissioner.

Appellees contend under Point II, page 16 of their brief that such a reference is necessary and the bankruptcy court seemed to agree with them as far as the discussion of his views are set out in the reporter's transcript. However, appellant is satisfied that the *McFarland* case cited in our brief and discussed by counsel for appellees, decides this point against them, and the cases cited in our opening brief have not been met.

III.

Bankruptcy Court Is Without Jurisdiction to Determine Adverse Claim of Third Party to Property in the Possession of Such Claimant.

On this point appellant is content to rest upon the cases herein above cited and cases in opening brief beginning at page 12 of that brief. The argument of counsel for appellees and citations of cases, do not meet or rebut the cases cited by appellant. In an attempt to evade the force of these cases appellees under Point VI, page 21 of their brief, *et seq.* take the position that the District Court had a right to make inquiry to ascertain if the adverse claim of appellant was real and substantial or merely colorable. Does not this contention beg the question and is it sincere? Appellees have all along heretofore contended that the bankruptcy court had complete and exclusive jurisdiction to determine the matter of appellant's claims and not that it should first determine whether appellant's claim was real or colorable and "if found to be real, and substantial, it must decline to determine the merits and dismiss the summary proceedings." (Appellees' Br. p. 22.) Nor was this the purpose of the reference made by the court. The order referred the petition of appellant to the commissioner "with plenary power and authority to proceed to hear and determine the issues that are presented by said petition." This is not a reference to the commissioner "for a hearing and report", nor to determine whether appellant's claim was "real or colorable", but with plenary power to hear and determine.

Plenary is defined by Black's Law Dictionary (p. 1367, Vol. 3, 3rd Ed.) as "Full, entire, complete, unabridged."

And Bouvier's Law Dictionary, Vol. 3, p. 2612 (3rd Ed.) as "full, complete," and says:

"In the courts of admiralty and in the English ecclesiastical courts causes of suits in respect to the different course of proceedings, in each are termed plenary and summary. *Plenary or full and formal suits are those in which the proceedings must be full and formal*, and the term summary is applied to those causes where the proceedings are more succinct and less formal. 2 Chitty Pr. 481."

Where a claim comes up that is adverse and is something new, the court may well and probably should put on foot an inquiry as to whether it was a real claim or merely colorable, but when it has been made to appear to the District Court that this adverse claim has stood the fire and test of two trials in the State court, this should establish the fact that it is very real and substantial and not merely colorable. Probably this question never suggested itself to the mind of the district judge, but he was under the impression that the real merits of the issues should be tried in the bankruptcy court, and the suggestion now made by counsel for appellees that the District Court had the right to ascertain that question, is purely an afterthought.

IV.

It Appearing From the Record, That Appellant and Appellees Are Residents and Citizens of the State of California, the Bankruptcy Court Could Not Try the Issue on the Merits Without Consent of Appellant.

Appellees have made no effective reply to this point set in appellant's opening brief Point III, page 16, and the authorities cited.

V.

Reply to Contention of Appellees That Appellant Has
Admitted Jurisdiction of Bankruptcy Court Under
Point VIII, Page 25, Is Without Merit.

Instead of the very scrambled and inaccurate statement by appellees as to what the action of the appellant is and was in the State court, we refer the court to the petition of appellant [Tr. pp. 12-19], which shows that it was an action brought to restrain trespass, and for damages and costs. And sets out the fact that the appellant was the owner of and in possession of the *res* involved herein; and also sets out the preliminary injunction granted by the State court against appellees. The complaint asked the added relief of quieting title against any of the claims of appellees, which were alleged to be without right or merit. This is certainly not an admission that appellants have any ownership right, title, claim or demand in or to the *res* or possession of same. But ownership and possession is affirmatively claimed by appellant.

Conclusion.

The only evidence before the district judge was the verified petition of appellant. This was served in ample time to have permitted an answer. None was made. Why? The case in the State court had been continued to November 25th, 1941, which was the day following hearing on petition. [Tr. p. 17.] The appellant is now and for many years last past has been the owner and in possession of the *res*, and should be permitted to conclude this second trial in the State court and bring a very expensive and tedious litigation to an end.

Respectfully submitted,

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Attorney for Appellant.

